No. _____

In The

Supreme Court of the United States

KELLY HACKWORTH,

Petitioner,

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

STANLEY M. WARD
Counsel of Record
WOODROW K. GLASS
WARD & GLASS, LLP
2600 John Saxon Blvd.,
Suite 350
Norman, OK 73071
(405) 360-9700
(405) 360-7902 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a federal regulation measuring the legislative term, "within 75 miles," with surface transportation miles, rather than radius miles, conflicts with other court decisions, contradicts the intent and history of the statute in question and results in an arbitrary application of FMLA law.

2. Whether the denial of a motion under Federal Rule of Civil Procedure 56(f) is proper when a court decides a question of fact before *any* discovery *can* been conducted.

3. Whether the presentation of a Rule 56(f) affidavit on a motion to reconsider under Rule 59 is untimely.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit.

The Petitioner here and Appellant below is Kelly Hackworth.

The Respondents here and Appellees below are Progressive Casualty Insurance Company, an Ohio corporation, and Jerry Johnson, individually.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Hackworth v. Progressive Casualty Insurance Co.*, 468 F.3d 722 (10th Cir. 2006). The opinion is reprinted in the Appendix hereto, pp. 1a-21a. The orders from the district court granting summary judgment and denying the motion for reconsideration were not reported but are reprinted in the Appendix hereto, pp. 22a-28a.

JURISDICTION

The Court of Appeals for the Tenth Circuit entered its judgment on November 14, 2006. Appendix 1a. Petitioner Kelly Hackworth ("Hackworth") timely sought rehearing en banc, and the Court of Appeals denied that on December 18, 2006. Appendix 29a. She now seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, Section 2611(2)(B)(ii).

(2) Eligible Employee.

(B) Exclusions. The term "eligible employee" does not include –

. . .

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

Federal Rule of Civil Procedure Rule 56(f).

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

A. Summary of Facts

Kelly Hackworth ("Hackworth") began working for Progressive Casualty Insurance Company ("Progressive") on or about the 26th day of March, 1996, and was promoted to Injury Ops Manager ("IOM") II in 2000. In 2002, Jerry Johnson ("Johnson") became State Claims Manager in Oklahoma and provided direct supervision over Hackworth's work activities. In his efforts to reorganize the department, he re-leveled Hackworth's position to an Injury Operations Manager I in January 2004.

On March 22, 2004, because Hackworth was dealing with her own illness and because her mother became ill

and was hospitalized, Hackworth contacted Progressive and requested time under the Family Medical Leave Act ("FMLA"). On that same day, Johnson offered Hackworth the option of either accepting a severance package due to the re-leveling or continuing in the IOM I position. On March 23, 2004, Hackworth went on leave under the FMLA.

On April 23, 2004, Hackworth filed a charge of gender-based discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging violation of Title VII of the Civil Rights Act of 1964, as amended, but reported her willingness and ability to return to work on May 28, 2004. However, Amy Harlan ("Harlan"), one of Progressive's employees, advised Hackworth not to return to work because her presence would be "uncomfortable" for everyone until after the EEOC mediation was completed on June 8, 2004.

Although Hackworth advised that she would return to work and continue as an Injury Ops Manager I at the end of her agreed, extended FMLA leave, Harlan then contacted Hackworth and advised her not to return to work because the position of Injury Ops Manager I was eliminated in its entirety. Neither Harlan nor any other agent or employee of Progressive offered Hackworth any other equivalent work or compensation. The supposed eliminated position was posted publicly soon thereafter and was later filled on September 29, 2004.

B. Course of Proceedings Below

On January 4, 2005, Hackworth filed her Complaint against Progressive and Johnson alleging that Respondents violated the Family and Medical Leave Act ("FMLA") by failing to reinstate Hackworth to her same or

a similar position upon her return from leave, and by retaliating against Hackworth for engaging in a protected activity, namely, utilizing FMLA for time off work.

On March 29, 2005, Respondents filed a motion for summary judgment claiming that Hackworth did not have jurisdiction to file suit under FMLA because Progressive did not employ fifty (50) people within seventy-five (75) miles of Hackworth's main worksite at the time Hackworth filed for leave under FMLA. At the time Respondents filed for summary judgment, the parties had not held their status and scheduling conference, nor had a discovery conference been held pursuant to Fed.R.Civ.P. Rule 26.

Hackworth responded to the brief and denied many of the so-called material facts. Hackworth also pointed out the fact that no discovery had been accomplished and that Respondents produced no real evidence in their motion to support their claims about the number of employees at the different worksites in Oklahoma. Essentially, Hackworth argued that since the Lawton worksite is within seventy-five (75) radius miles of Hackworth's Norman site, then its employees should be included in determining whether Hackworth is an eligible employee. Also, at the time Hackworth filed her response, there had been no persuasive case law regarding the proper measure of the required 75-mile distance.

Respondents filed a reply brief and relied heavily, for the first time, on 29 C.F.R. § 825.111(b), which measures the distance by surface miles using surface transportation. Before Hackworth could file a sur reply to respond to Respondents' argument, the district court entered an Order granting the summary judgment on April 28, 2005.

On May 2, 2005, Hackworth filed a motion for reconsideration, and submitted an affidavit under Fed.R.Civ.P. Rule 56(f). Respondents filed a response on May 5, 2005, and the district court denied Hackworth's motion on that same day.

On May 27, 2005, Hackworth appealed both orders to the United States Court of Appeals for the Tenth Circuit with a Notice of Appeal. The Tenth Circuit issued its Opinion on November 14, 2006, and affirmed the district court's orders. Hackworth filed a Petition for Rehearing En Banc on the district court's denial of relief under Fed.R.Civ.P. Rule 56. That petition was denied on December 18, 2006.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The instant matter is unique and worthy of review because it involves the interpretation of a federal statute with broad-ranging effects upon the businesses and workforce of America. At issue is statutory language which determines whether employees receive the protections provided by the Family and Medical Leave Act ("FMLA"). Only employees employed at a worksite at which his or her employer employs more than 50 employees within 75 miles of that worksite is an eligible employee under the FMLA and able to take advantage of the statute's benefits. See 29 U.S.C. § 2611(2)(B)(ii).

The unanswered question posed by the statute is how to determine and measure "within 75 miles." Because no specific measurement technique is referenced in the statute, the determination needs to be made as to whether

"within 75 miles" should be measured by radius miles or surface transportation miles. The history reports for the statute indicate that Congress was contemplating a radius measurement, and such a technique is more uniform, consistent, and reasonable. Other circuit courts have also seemingly used a 75-mile radius when discussing the geographic limitation.

However, the federal regulations recommend that the 75-mile computation be measured by surface miles, using surface transportation over public streets, roads, highways and waterways by the shortest route from the facility where the eligible employee needing leave is employed. See 29 C.F.R. § 825.111(b). By finding that this federal regulation is a valid implementation of FMLA law, the majority incorrectly decided an issue central to the application of FMLA, and in turn has decided a matter worthy of this Court's review. Essentially, review is necessary to finally decide the correct interpretation of the statutory language in question, that is, whether "within 75 miles" is measured by radius miles or surface transportation miles.

Hackworth also contends that review is necessary regarding the intent, purpose, and timeliness of requesting relief under Fed.R.Civ.P. 56(f). The majority failed to recognize that Hackworth has had zero opportunity to conduct discovery on a question of fact, and has therefore decided an issue in conflict with earlier decisions of this Court.

I. Review is Warranted Because the Majority Opinion Conflicts with Other Circuit Courts Regarding the Correct Measurement of the 75-mile Geographic Limitation included in 29 U.S.C. § 2611(2)(B)(ii)

The majority opinion in the instant matter concludes that the language "within 75 miles" included within 29 U.S.C. § 2611(2)(B)(ii) should not be measured using a radius computation. However, most of the Circuit Courts discussing this particular statutory provision have interpreted the language by ignoring the interpretation set forth by the Department of Labor in 29 C.F.R. § 825.111(b) and by using 75 radius miles without even discussing the issue.

Courts in several different circuits have all referenced a 75-mile ***radius*** when discussing the application of FMLA and its geographical limitations. See *Minard v. ITC Deltacom Communs., Inc.*, 447 F.3d 352, 355 (5th Cir. 2006) (employee not an eligible employee due to there being less than 50 employees within a 75-mile radius of her worksite on the day she requested); *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004) (quoting House Report stating that there is a " . . . geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities."); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254 (11th Cir. 2004) (in order for the statute to apply, the employer(s) at issue must have at least 50 employees within a 75-mile radius of the worksite); *Moreau v. Air Fr.*, 356 F.3d 942, 945 (9th Cir. 2004) (employer employed fewer than 50 employees at Moreau's worksite or within a 75-mile radius, and thus was exempt from the FMLA); *Thomas v. Pearle Vision*, 251 F.3d 1132, 1139, fn. 3 (7th

Cir. 2001) (it is presumed that all employees in major metropolitan areas are eligible because it is likely that there are more than 50 employees within a 75-mile radius).

Numerous district courts have also found that the distance is measured using radius miles. See *Nordquist v. City Finance Co.*, 173 F.Supp.2d 537 (N.D.Miss. 2001) (holding that plaintiff was not eligible for FMLA leave because there were less than 50 employees within a 75-mile radius); *Paleologos v. Rehab Consultants, Inc.*, 990 F.Supp. 1460 (N.D.Ga. 1998) (finding that plaintiff must demonstrate that employer employed at least 50 employees within a 75-mile radius); *Rollins v. Wilson County Government*, 967 F.Supp. 990 (M.D.Tenn. 1997) (holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile radius); *Figueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299 (S.D.N.Y. 1996) (finding that an "eligible employee" must work for an employer with 50 employees within a 75-mile radius); *Rich v. Delta Air Lines, Inc.*, 921 F.Supp. 767 (N.D.Ga. 1996) (holding that an "eligible employee" must be employed at worksite with at least 50 employees within a 75-mile radius); *Sylvester v. Dead River Co.*, 260 F.Supp.2d 181, 186 (D.Me. 2003) (stating that the record does not contain number of employees within a 75-mile radius of worksite); *Lincoln v. Sears, Roebuck and Co.*, 2002 WL 31108204 (D.Minn. 2002) (defendant argued that there were not 50 employees within a 75-mile radius).

Hackworth admits that none of these cases directly discuss what the correct form of measurement should be, but the sheer number of authorities highlights an important aspect of the discussion. The case authority has

almost unanimously determined that the computation used to measure the distance between worksites is a linear measurement and not surface transportation miles. In fact, besides the only other case to tackle this specific subject in the Fifth Circuit, *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005), Hackworth can find no decision in which a court refers to the 75-mile measurement as 75 driving miles or 75 road miles when discussing the eligibility requirements of the FMLA.

Hackworth contends that there is no such case authority regarding road miles because when interpreting similar geographical limitation language passed by Congress in other areas, other courts have found that the use of radius miles is the correct methodology. For example, in *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979), the Fifth Circuit considered the correct method to use in which to measure distance required by the language governing service of process. Federal Rules of Civil Procedure, Rule 4 states that service of a summons or filing a waiver of service will establish jurisdiction over the person of a defendant who is a "party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues." Fed.R.Civ.P. 4(k)(1)(B).

The Fifth Circuit ultimately held that the "simplest and most proper method is the straight lines or 'as the crow flies' measure of air miles", and that this measurement offers a more uniform standard than a measure based on road miles, which "will continually fluctuate as new and different routes are constructed." *Sprow*, 594 F.2d at 417. The *Sprow* Court further cited additional courts that have also adopted the "as the crow flies" mode of

calculation. *See Lee v. Ohio Cas. Ins. Co.*, 445 F.Supp. 189, 193 n.12 (D.Del. 1978); *Pillsbury Co. v. Delta Boat & Barge Rental, Inc.*, 72 F.R.D. 630, 631 (E.D.La. 1976); *Deloro Smelting and Refining Co. v. Engelhard Minerals and Chemicals Corp.*, 313 F.Supp. 470, 473-75 (D.N.J. 1970); *Pierce v. Globemaster Baltimore, Inc.*, 49 F.R.D. 63, 66 (D.Md. 1969).

Additionally, the majority's opinion conflicts with the method of measuring similar language as contained in the Sherman Act. The issue was the language in 15 U.S.C. § 1293, which places a limitation on telecasting games located "within 75 miles of the game site of any intercollegiate or interscholastic football contest. . . ." In a Tenth Circuit case, the district court and the circuit court found, without argument, that the term "within 75 miles" meant within a 75-mile radius. *Colorado High School Activities Assoc. v. National Football League*, 524 F.Supp. 60 (U.S. Dist. Ct. Colo. 1981); affirmed by *Colorado High School Activities Assoc. v. National Football League*, 711 F.2d 943 (10th Cir. 1983) (to provide the required circular umbrella of protection, "there had to be a point to which its radius could be measured, and limited, to 75 miles.")

Also of relevant comparison to the instant determination is the case of *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3rd Cir. 2005) (disregarding argument that 30-mile radius ignores the geography of the region and makes actual distances that patients must travel much greater than that perceived when relying on an "as the crow flies" radius).

In summary, the majority opinion has entered a decision in conflict with decisions of other court of appeals on the issue of whether the geographical limitation contained within the FMLA should be measured using a

radius computation. Other courts have found that a 75-mile radius should be used in determining an eligible employee, and courts considering the correct method of measurement for other statutory limitations have utilized the linear computation. This Court should grant review to resolve this discrepancy.

II. Review is Warranted Because the Majority Opinion Validates a Federal Regulation that is Contrary to the History and Intent of the Statute

Because the majority has validated a federal regulation that appears to be in conflict with the legislative history of the statute, clarification is needed by this Court regarding the history and intent of 29 U.S.C. § 2611(2)(B)(ii). Hackworth contends that Congress spoke directly on the correct measurement of the 75-mile requirement contained in 29 U.S.C. § 2611(2)(B)(ii) and indicated that a radius measurement should be utilized when determining eligible employee status. However, the majority discounts the legislative history in its analysis and validates the federal regulation although it appears to interpret the statute in question in a way contrary to the statute's intent.

In determining the first step of the analysis laid out in this Court's opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984), both the district court and circuit court should avail itself of the traditional means of statutory interpretation which includes the text itself, its history, and its purpose. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236, 1248-49, 157 L. Ed. 2d 1094 (2004). If it is determined that

Congress has spoken to the precise question at issue after examination of the text, its history and its purpose, such intent must control. *Chevron*, 467 U.S. at 842-43.

It is true that the text of the statute in question provides no clear and direct guidance as to the proper measurement technique, but it also does not belie the claim that a linear mileage test should be utilized. In fact, the history of the statutory language indicates that Congress intended to utilize the radius test as the correct measurement of the 75-mile geographic boundary. **On numerous occasions within every House and Senate Report drafted to discuss the FMLA, Congress makes reference to "a 75-mile *radius*"** [Emphasis added]. See H.R. Rep. No. 102-35(I), at 37 (1991), H.R. Rep. No. 101-28(I), at 24 (1989) ("For purposes of determining the size of an employer, there is a geographic limitation of ***a 75-mile radius*** that applies to the aggregation of employees at different facilities" [Emphasis added]); S. Rep. No. 103-3, at 2, 25, 42, 43 (1993); S. Rep. No. 102-68, at 58, 59-60 (1991). It also appears that the cost projections, estimates, and impact statements done by the General Accounting Office and the Congressional Budget Office have used the term "radius" when discussing the measurement between worksites. Respondents and the majority claim that the term radius is not used in every discussion of the 75-mile limitation, but it is undisputed that Congress never mentions "75 driving miles" or "75 surface transportation miles."

Moreover, it is somewhat disingenuous for the majority to claim that there is no indication that Congress mentioned the term "radius" in its technical sense and not in its colloquial sense. See Appendix 12a-13a. In reality, there is no difference between the ordinary and technical

meaning of the term "radius." Even junior high students understand the measurement of distance meant when the term "radius" is used because the term has a very distinct and recognizable use.

Additionally, the majority claims that the purpose of the provision in question belies Hackworth's claim that Congress intended to use a radius mile measurement, rather than a surface-mileage test. The purpose of the FMLA legislation, as set forth in 29 U.S.C. § 2601(b), is to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity", to entitle employees to take reasonable leave for medical reasons, and to do all of this in a manner that accommodates the legitimate interests of employers. Implementing the linear measurement of "within 75 miles" obviously contemplated by Congress would not in any way defeat this purpose.

In essence, although the legislative history is replete with references to a "75-mile radius" in which to measure the geographical limitation set forth in 29 U.S.C. § 2611(2)(B)(ii), the majority opinion discounted such guidance and found that transportation miles should be used. Review is needed by this Court to implement the true history and intent of the statute in question in furtherance of the first step set out in *Chevron*.

III. Review is Warranted Because the Majority Opinion Validates a Federal Regulation that Results in the Arbitrary Application of the Statute in Question

The use of a radius or linear measurement in determining whether an employer has 50 employees within 75 miles of a particular worksite is uniform, consistent, and plainly determined. Using this methodology, an employee in Thermopolis, Wyoming receives the same entitlement under FMLA as an employee in New York City, New York; an employee who drives a winding, meandering country road to work is afforded the same protections under FMLA as an employee who uses a straight line interstate to get to work; and employers are not involved in court proceedings to determine which route between worksites is the shortest to avoid coverage under the FMLA. In other words, not only is the federal regulation in question manifestly contrary to the statute it is interpreting, its application is arbitrary and capricious and should not have been honored by the majority opinion.

According to this Court in *Chevron*, the second test to examine is whether the regulation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. **The regulation must be invalidated if it is "arbitrary, capricious, or manifestly contrary to the statute."** [Emphasis added]. *Id.* at 844. As discussed in full above, the regulation is patently contrary to the intent of the statute, as set forth in the history of the legislation. Since it appears that Congress has expressed its intent to measure the 75-mile distance using a radius computation, and because the regulation is arbitrarily applied, the Secretary of Labor's interpretation is not a permissible construction of the statute.

This Court has previously held in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002) that **the Secretary of Labor was granted *limited authority* to prescribe regulations concerning the FMLA**. The Secretary of Labor does not have the right or authority to alter the coverage of the leave entitlement provided by Congress. In *Ragsdale*, this Court held that no further analysis was needed because the FMLA regulation [in that case § 825.700(a)]:

> effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here.

Ragsdale, 535 U.S. at 96.

Pursuant to 29 U.S.C. § 2654, the Secretary of Labor was only granted authority to "prescribe such regulations as are necessary to carry out" the Act. In the case at hand, the Secretary of Labor has again exceeded the authority granted to it by Congress by reducing the coverage of the FMLA. Because of the surface-mile measurement standard, the number of employees covered under the FMLA will be greatly reduced in larger numbers than what was intended. Clearly, Congress contemplated the fact that many workers will not be covered when it implemented the 50/75 rule, but Hackworth contends that it did not intend to further limit the coverage of the FMLA by

denying those employees within 75 radius miles any protection.

The surface-transportation method of measurement results in an absurd and arbitrary application of the FMLA. An employee may be denied coverage one day after a fellow employee was granted coverage simply because the state government decided to begin construction on the one roadway connecting the two worksites. One employee at a worksite within 75 radius miles of another may be eligible for coverage because the transportation route between worksites is straight, while another employee at a worksite within 75 radius miles of another worksite will be denied coverage because the roadway between the two sites has too many curves.

Moreover, the administrative regulation is confusing and capricious itself. It states that, "[a]bsent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g. airline miles)." 29 C.F.R. § 825.111(b). This language can be read to say that if there is no road between the two worksites, then radius miles can be used. Therefore, although the situation is more grim for an employer (because it would theoretically be forced to transport an employee by airplane to another worksite), it is more beneficial to the employee.

In other words, the majority states that "it is only logical that conditions which negatively affect the viability of moving an employee from one worksite to another may well come into play." Appendix 14a. However, it is not logical to say that as the hardship on the employer to move an employee from one worksite to another increases, the employee's ability to be covered under the FMLA also

increases. Yet this is precisely what happens with the regulation in question. Although it would be worse for Progressive, it would be better for Hackworth if there was no road between Norman and Lawton. This simply makes no sense and exemplifies the arbitrary and capricious nature of the regulation in question.

The Fifth Circuit in *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) mentions a Grand Canyon example to show how a linear measurement may be deceiving and the majority cites that example in its Opinion. Appendix 11a. This example actually shows how arbitrary and capricious the regulation is. Even assuming there are businesses on the north and south rims of the Grand Canyon, this Court should take judicial notice that there are no highways or acceptable roads within the Grand Canyon in which employees can travel to the different worksites. Since this is the case, an employee working at one of the Grand Canyon offices would be covered under FMLA because her eligibility would be decided by radius miles. The employer with the worksites would have to shuttle the employee back and forth using an airplane, even though there are no airports on the north and south rims of the Grand Canyon. Neither the Fifth Circuit nor the majority addresses this issue in their decisions, but it evidences a problem with the regulation inherent in its own language.

In essence, the regulation should be struck down just as this Court struck down the FMLA regulation in *Ragsdale*. The Secretary has overstepped his authority, and instead of simply "carrying out" the provisions of the FMLA, has significantly altered the coverage of the Act. This alteration has placed the determination of eligibility under FMLA in the hands of the government as

it determines where to put its roadways. Additionally, the language of the regulation conflicts with the very purpose it intends to advance since it gives more protections to employees even though the hardships to the employer increase. Review is needed by this Court since the regulation is arbitrary, capricious and manifestly contrary to the statute.

IV. Review is Warranted Because the Majority Opinion Regarding Appellant's Motion Under Federal Rule of Civil Procedure 56(f) Conflicts with Prior Decisions of this Court and Other Circuit Courts

Hackworth contends that there is ample reason for this Court to review the majority's opinion for the reasons set forth above, but she further claims that review is warranted to review the issues involving Federal Rule of Civil Procedure 56(f). The majority states that Hackworth's real issue on appeal was that "the district court abused its discretion in refusing to grant Ms. Hackworth additional time to conduct discovery." Appendix 5a. In fact, **Hackworth never had *any* time to conduct discovery** and therefore could not even receive "additional" time. The majority's refusal to recognize the fact that Hackworth has been prejudiced because **she has been unable to conduct *any* discovery** to respond to the motion has caused its Opinion to come into conflict with other decisions by this Court and other circuit courts.

The error in the majority opinion is the determination of whether Hackworth should be allowed "additional" time to conduct discovery. Hackworth had zero time to conduct discovery since Respondents filed their motion for summary judgment before the Rule 26 conference or the

Status and Scheduling Conference, and no discovery is allowed before such conference. See Fed.R.Civ.P. 26(d). The ultimate question considered in this matter is not whether summary judgment can be entered although discovery is ongoing, but whether summary judgment can be entered when the non-moving party has not even had the opportunity to conduct any discovery of facts and evidence exclusively within the control of the moving party.

The answer to that conundrum lies within this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The *Celotex* Court clearly stated the "plain language of Rule 56(c) mandates the entry of summary judgment, ***after adequate time for discovery*** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Emphasis added]. *Celotex*, 477 U.S. at 322.

Additionally, this Court has found that if ***the non-moving party "has not had the opportunity to discover information that is essential to his opposition" summary judgment should not be granted.*** [Emphasis added]. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). And finally, while Respondents' exclusive control of the documents in this case does not automatically require relief under Rule 56(f), the movant's exclusive control of requested information is "a factor which weighs heavily in favor of relief under rule 56(f)." *Hebert v. Wicklund*, 744 F.2d 218, 222 (1st Cir. 1984); see also *Weir v. Anaconda Co.*, 773 F.2d 1073, 1083 (10th Cir. 1985).

The majority has also decided an issue in conflict with earlier Tenth Circuit language in *Weir*. The *Weir* Court held that there is no requirement in Rule 56 that summary judgment not be entered until discovery is complete, but **"sufficient time for discovery is *especially important* when relevant facts are exclusively in the control of the opposing party."** [Emphasis added]. *Weir*, 773 F.2d at 1081. The *Weir* Court further cited prior Tenth Circuit law to state that "summary judgment should not be based on the deposition or affidavit of an interested party . . . as to the facts known only to him – a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." *Weir*, 773 F.2d at 1081; quoting *Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1037 (10th Cir. 1978). And the *Weir* Court noted in a footnote that commentators generally recognize that courts should be cautious in granting summary judgment when relevant facts are peculiarly within the knowledge of the adverse party. *Weir*, 773 F.2d at 1081, fn. 8.

The ability to conduct discovery becomes increasingly important in the instant matter, because the overriding issue in this matter is whether Hackworth is an eligible employee under the FMLA. It has been held that the question of "eligible employee" status implicates both jurisdiction and the merits, and is properly reserved for the finder of fact. *Morrison v. Amway Corp.*, 323 F.3d 920, 928 (11th Cir. 2003). It has also been held that "whether plaintiff is an eligible employee under the FMLA should be decided on a complete record, after both plaintiff and defendant have had an opportunity to conduct discovery." *Fegueira v. Black Entertainment Television, Inc.*, 944 F.Supp. 299, 309 (S.D.N.Y. 1996). Therefore, by finding that the district court did not abuse its discretion in

refusing to grant Hackworth relief under Rule 56(f), the panel decision conflicts with these decisions and this Court should take review.

V. REVIEW IS WARRANTED BECAUSE THE MAJORITY OPINION IMPROPERLY LIMITS THE NON-MOVANT'S ABILITY TO UTILIZE FEDERAL RULE OF CIVIL PROCEDURE 56(f)

The majority finds that Hackworth's Rule 56(f) affidavit was submitted untimely and that the District Court did not abuse its discretion in refusing to grant Hackworth additional time for discovery. As stated above, Hackworth received zero time for discovery, but the majority also erred in finding that Hackworth's request under Rule 56(f) was untimely. This Court should take review to decide the issue of whether a request for relief under Rule 56(f) is untimely even if it was raised before the district court before the appeal process had begun.

Hackworth realizes that the request for relief under Fed.R.Civ.P. 56(f) generally should be made in opposition to a motion for summary judgment and not after the fact, and that it is "perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit" in the original response to summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (quoting 6 J. Moore, Federal Practice and Procedure, Para. 56.22[2], pp. 2824-2825 (2d ed. 1966)). However, this Court has also stated, as has been discussed above, that motions for summary judgment should be adjudicated with due regard to the non-movant's right to contest the claim. *Celotex*, 477 U.S. at 327. Hackworth therefore contends that the majority Opinion's attempt to gauge the procedural validity of Hackworth's Rule 56(f)

motion by an examination of a calendar or stopwatch is contrary to established law. See *id.*; *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3rd Cir. 1988) (indicating that Rule 56(f) submissions should be liberally treated by the court to achieve substantive purpose).

The majority Opinion incorrectly applies several cases to the instant situation although in those cases, a Rule 56(f) affidavit was never placed in front of the district court. See *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828 (10th Cir. 1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998); *Price, ex rel., Price v. W. Res. Inc.*, 232 F.3d 779 (10th Cir. 2000). It is undisputed that Hackworth, however, did file an affidavit under Rule 56(f).

The majority Opinion also conflicts with the Fed.R.Civ.P. 59 when it finds that "Rule 56(f) grants the district court the power to either deny a summary judgment motion or order a continuance; it does not grant the power to vacate a prior grant of summary judgment so that additional discovery can be conducted." Appendix 20a. Hackworth's motion to reconsider was brought under Rule 59, which does grant the district court the power to alter or amend a prior grant of summary judgment so that additional discovery can be conducted. The grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. See *Servants of the Paraclete v. Doe*, 204 F.3d 1005, 1012 (10th Cir. 2000). As set forth in her briefs on this issue, Hackworth sought her motion to reconsider in order to correct clear error or prevent manifest injustice.

In summary, this case presents a question of exceptional importance because of the clear manifest injustice Hackworth has experienced. Cases with factual disputes should not be decided without conducting any discovery at all, and Hackworth should not be punished for certain unique timing issues, including the filing of the summary judgment before discovery could be conducted under Rule 26, and the Fifth Circuit's opinion on a similar issue right after the Court's Order granting summary judgment. Because the law does not mandate determining the validity or merits of Hackworth's Rule 56(f) affidavit based upon days or hours, but with due regard to the nonmovant's right to contest the claim, this Court should grant certiorari to review this matter.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

STANLEY M. WARD
Attorney at Law
Counsel of Record
WOODROW K. GLASS
Attorney at Law
WARD & GLASS, LLP
2600 John Saxon Blvd.,
Suite 350
Norman, OK 73069
(405) 360-9700
(405) 360-7902 (fax)
Attorneys for
Petitioner Kelly Hackworth

468 F.3d 722

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KELLY HACKWORTH, Plaintiff-Appellant, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation; JERRY JOHNSON, individually, Defendants-Appellees.	No. 05-6198 (Filed Nov. 14, 2006)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 05-CV-11-R)

Scott F. Brockman, (Stanley M. Ward and Woodrow K. Glass, on the briefs), Norman, Oklahoma, for Plaintiff-Appellant.

Brad Leslie Roberson, (Gerard F. Pignato and R. Thompson Cooper, on the brief), Pignato & Cooper, P.C., Oklahoma City, Oklahoma, for Defendants-Appellees.

Before **KELLY**, **HOLLOWAY**, and **McCONNELL**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant Kelly Hackworth appeals from the district court's grant of summary judgment in favor of Defendants-Appellees Progressive Casualty Insurance Company and Jerry Johnson (collectively "Progressive") on her claim for damages pursuant to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. Ms. Hackworth challenges deference to a Department of Labor ("DOL") regulation defining the term "within 75 miles" located in 29 U.S.C. § 2611(2)(B)(ii). Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm due to the failure of Ms. Hackworth to establish her FMLA claim.

Background

Ms. Hackworth was employed at Progressive's Norman, Oklahoma worksite as an Injury Operations Manager II when, on March 19, 2004, she requested paid leave under the FMLA to care for her mother. In response, Ms. Hackworth's immediate supervisor, Jerry Johnson, told her to choose between a demotion to an Injury Operations Manager I and a severance package. He also gave her three days of paid time off work to make her decision.[1] At the end of the three day period, however, Ms. Hackworth was approved for FMLA leave.

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[1] The record is unclear whether Ms. Hackworth ever responded to Mr. Johnson's offer and, if so, what that response was.

During her FMLA leave, on April 23, 2004, Ms. Hackworth filed a charge of gender discrimination against Progressive with the Equal Employment Opportunity Commission ("EEOC"), alleging that Progressive had violated her rights under Title VII of the Civil Rights Act of 1964. On May 20, 2004, Ms. Hackworth and Progressive agreed to conduct a mediation, which was to occur on June 8, 2004, in an attempt to resolve Ms. Hackworth's gender discrimination claim against the company. Meanwhile, on or about May 28, 2004, Ms. Hackworth contacted Amy Harland, Progressive's Human Resource Consultant/Manager, to express her willingness to return to work because her FMLA leave was due to expire on June 1, 2004. Ms. Harland, however, directed Ms. Hackworth not to return to work until the mediation process was complete. At the conclusion of the June 8, 2004 EEOC mediation, by agreement of the parties, Ms. Hackworth's FMLA leave was extended through the close of business on June 22, 2004.

Before the close of business on June 22, 2004, Ms. Hackworth contacted Progressive and informed it of her intention to return to work as an Injury Operations Manager I. Ms. Harland, however, informed Ms. Hackworth not to return to work because the position of Injury Operations Manager I had been eliminated. Moreover, neither Ms. Harland nor any other agent or employee of Progressive offered Ms. Hackworth equivalent work or compensation. Ms. Hackworth subsequently brought suit in the district court against Progressive pursuant to 29 U.S.C. § 2617(a)(1) claiming it violated the FMLA in failing to reinstate her to the same or a similar position upon her return from FMLA leave in violation of 29 U.S.C. § 2614(a)(1), and in retaliating against her for utilizing the

FMLA to receive paid time off in violation of 29 U.S.C. § 2615(a)(1).

Progressive subsequently moved for summary judgment arguing that Ms. Hackworth was not an "eligible employee" under the FMLA because Progressive did not employ at least 50 people within 75 surface miles of Hackworth's Norman, Oklahoma worksite. Progressive admitted that at the time Ms. Hackworth began her FMLA leave it employed a combined total of 47 employees at its Norman worksite, where Ms. Hackworth was employed, and its Oklahoma City worksite, which is within 75 surface miles of its Norman worksite.[2] Progressive also admitted that it employed three additional employees at its Lawton, Oklahoma worksite but submitted evidence that that worksite is not within 75 surface miles of the Norman worksite. In opposition to summary judgment, Ms. Hackworth submitted evidence that the Lawton worksite is 75.6 surface miles[3] and 67 linear miles from the Norman worksite. Ms. Hackworth argued that the distance between the Lawton and Norman worksites should be measured "as the crow flies," i.e. in linear miles, and therefore 67 miles is the appropriate distance by which to measure the geographic proximity of the two

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[2] Specifically, Progressive admitted that its Oklahoma City worksite is 31.47 surface miles from its Norman worksite.

[3] Progressive submitted evidence that the Lawton worksite is 79.8 surface miles from the Norman worksite, rather than the 75.6 miles that Ms. Hackworth alleges. Neither party adduced evidence that the distance between the Lawton and Norman worksites is less than 75 surface miles. Because on summary judgment we view the evidence in the light most favorable to the nonmoving party, *Oliveros v. Mitchell*, 449 F.3d 1091, 1095 (10th Cir. 2006), we will assume for purposes of this appeal that the Lawton worksite is indeed 75.6 surface miles from the Norman worksite.

worksites. Thus, she argued that at the time her FMLA leave commenced Progressive employed 50 people within 75 miles of her worksite and she was an "eligible employee" under the FMLA.

The district court granted summary judgment to Progressive, holding that a DOL regulation, 29 C.F.R. § 825.111(b) (1995), which states that the 75-mile distance must be measured in surface miles, was owed judicial deference. This appeal followed. On appeal, Ms. Hackworth argues that: (1) Congress clearly intended that a "radius test," i.e. linear miles, be used when determining whether two worksites are "within 75 miles" of each other; (2) the DOL's use of a surface mile test is arbitrary and capricious; (3) 75.6 miles should be considered to be "within 75 miles"; (4) even assuming the Lawton worksite is not "within 75 miles" of the Norman worksite, the distance over 75 miles is so small that the court should nonetheless hold that Ms. Hackworth is an "eligible employee"; and (5) the district court abused its discretion in refusing to grant Ms. Hackworth additional time to conduct discovery.

Discussion

I. Standard of Review

Because the district court granted Progressive's motion for summary judgment, our review is de novo and we apply the same standards as the district court. *Adamson v. Unum Life Ins. Co.*, 455 F.3d 1209, 1212 (10th Cir. 2006). That is, summary judgment is appropriate where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Moreover, we review a district court's

decision regarding the validity of an agency regulation de novo. *Reames v. Oklahoma ex. rel. OK Health Care Auth.*, 411 F.3d 1164, 1168 (10th Cir. 2005).

II. The Statutory and Regulatory Framework

The FMLA, 29 U.S.C. §§ 2601-2654, was enacted, in part, "to balance the demands of the workplace with the needs of families . . . [and] to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." *Id.* at § 2601(b). The FMLA therefore requires covered employers to provide eligible employees with up to twelve weeks of unpaid, job-protected medical leave per year, among other things, to care for a parent of the employee with a serious health condition. *See id.* § 2612(a)(1)(C). However, in furtherance of the balance between the needs of employees and the interests of employers, Congress included two exceptions to the FMLA's coverage. First, Congress excluded those employers with fewer than 50 total employees. *See id.* § 2611(4)(A)(i). Second, Congress excluded from the FMLA's coverage those employees whose employer employs fewer than 50 people "within 75 miles" of the employee's worksite ("the 50/75 provision").[4]

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[4] If an employer does not employ at least 50 people "within 75 miles" of an individual's worksite, that individual is not an "eligible employee" for FMLA purposes. *See* 29 U.S.C. § 2611(2)(B). Despite Progressive's contention, however, one's failure to qualify as an "eligible employee" does not mean this court lacks subject matter jurisdiction. *See Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006) ("[T]he threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."); *Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352, 357 (5th Cir. 2006) ("*Arbaugh* has clearly rejected the conflicting view of the Courts of Appeals . . . that employee-numerosity requirements in the FMLA and

(Continued on following page)

See id. § 2611(2)(B)(ii). Congress recognized that, given these two exceptions, the FMLA would only cover approximately "5 percent of U.S. employers and 40 percent of U.S. employees." S. Rep. No. 102-68, at 24 (1991); *see also* H.R. Rep. No. 102-35(I), at 37 (1991).

Congress, in the FMLA, also expressly granted the Secretary of Labor the power to "prescribe such regulations as are necessary to carry out [the FMLA]." 29 U.S.C. § 2654. Pursuant to this grant of power, the DOL promulgated a regulation, in part, to clarify the method to use in determining whether two worksites are "within 75 miles" of one another, which provides:

> The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g. airline miles).

29 C.F.R. § 825.111(b) (1995).[5] The primary question we must resolve in this appeal is whether § 825.111(b) is a valid regulation implementing the FMLA.

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other statutes are jurisdictional rather than simply an element of a plaintiff's claim for relief.").

[5] Additionally, 29 C.F.R. 825.110(f) (1995) provides that "[w]hether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave."

III. Judicial Deference to 29 C.F.R. § 825.111(b)

Ms. Hackworth challenges the DOL regulation clarifying that surface miles are to be used in determining whether two worksites are "within 75 miles" of one another. The standard to be used in analyzing an agency's construction of a statute it administers, articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is well-known and oft-applied. Pursuant to *Chevron*, we must analyze such a construction in a two-step process. *Id.* at 842-44. First, we look to whether Congress directly spoke to the precise question at issue. *Id.* at 842. In so doing, we look to, among other things, the statutory text, history, and purpose. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). If congressional intent is clear on the precise question at issue, our analysis ends and the congressional intent is given effect. *Chevron*, 467 U.S. at 842-43. This follows from the fact that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

If congressional intent is ambiguous, we proceed to the second step in the *Chevron* analysis and look to "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Because administrative agencies are ordinarily more adept at reconciling conflicting policies within their areas of expertise than are courts, we uphold an agency's construction of a statute it administers so long as it is not arbitrary, capricious, or manifestly contrary to the statute at issue. *Id.* at 844; *Harbert v. Healthcare Servs. Group*, 391 F.3d 1140, 1147 (10th Cir. 2004).

A. *Chevron Step One*

As previously mentioned, *Chevron* first demands that we determine whether Congress clearly spoke as to the method to be used in ascertaining whether two worksites are "within 75 miles" of one another. 467 U.S. at 842. Ms. Hackworth argues that Congress clearly spoke on this precise issue in that the House and Senate Reports accompanying the FMLA, in several instances, provide that the aggregation of employees at geographically distinct worksites is limited to those facilities within a "75-mile radius." Ms. Hackworth contends that use of the word "radius" demonstrates that Congress clearly meant for a linear mileage test to be used, rather than a surface mileage test. The text and purpose of the 50/75 provision, however, belie Ms. Hackworth's argument.

Congress did not expressly indicate in 29 U.S.C. § 2611(2)(B)(ii) how one should measure the geographic proximity of two distinct worksites. That subsection simply states that two worksites must be "within 75 miles" of one another, and is devoid of the word "radius" that Ms. Hackworth finds so crucial. While the term "within 75 miles" is not inherently ambiguous, *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005), this case itself demonstrates that reasonable people may differ on the term's meaning. In fact, at oral argument, Ms. Hackworth's counsel conceded that congressional intent is not clear from the text of § 2611(2)(B)(ii) standing alone. The FMLA also does not otherwise indicate how the geographic proximity of two worksites should be measured. Thus, Congress did not express its clear intent with regard to the precise question at issue in the statutory text.

Turning to statutory purpose, as previously noted, the FMLA was enacted, in part, "to balance the demands of the workplace with the needs of families . . . [and] to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). In striking this balance, Congress provided an exception to the FMLA's coverage "for small operations – that is, a potentially large company with a relatively small satellite office in a particular area." *Harbert,* 391 F.3d at 1148 (discussing 29 U.S.C. § 2611(2)(B)(ii)). The 50/75 provision was specifically designed to accommodate employer concerns about "the difficulties an employer may have in reassigning workers to geographically separate facilities." H.R. Rep. No. 102-135(I), at 37 (1991); *see Moreau v. Air France,* 356 F.3d 942, 945-46 (9th Cir. 2004) ("[I]t might be reasonable to expect an employer to relocate workers from nearby facilities for the period of an FMLA leave . . . , but it would be understandably more difficult to reassign an employee whose family lives in Los Angeles to work in San Francisco for three months.").

Given the statutory purpose of the FMLA and the 50/75 provision, it does not appear that Congress clearly intended that the geographic proximity of two worksites is to be measured in linear miles. In fact, the statutory purpose for the 50/75 provision indicates that Congress just as likely intended a surface measurement to be utilized. The difference in the time and cost of transportation between a covering employee's home worksite and a new, temporary worksite is a significant impediment to employers with far-flung operations in covering for employees who take FMLA leave. While in many instances the geographic proximity of two worksites measured in

linear miles is an adequate proxy for the feasability of transferring employees between those worksites, there are a few circumstances in which a linear measurement is deceiving. *See Bellum,* 407 F.3d at 739 (giving an example of a company that is forced to transfer employees between offices on the north and south rims of the Grand Canyon). On the other hand, the distance between two worksites measured in surface miles is nearly always a reasonable proxy for the feasibility of temporarily relocating an employee to another worksite because "the overwhelming majority of workers in this country use surface transportation to get to work. . . . " *Id.* at 740. As a result, the 50/75 provision's statutory purpose does not support the use of one measurement more than the other.

Ms. Hackworth correctly points out that Congress, on numerous occasions in both the House and Senate Reports accompanying the FMLA, states that an employer must, in order to be covered by the FMLA, employ at least 50 people "within a 75-mile *radius.*" *See, e.g.,* H.R. Rep. 102-35(I), at 37 (1991) ("[T]here is a geographic limitation of *a 75-mile radius* that applies to the aggregation of employees at different facilities." (emphasis added)); S. Rep. No. 103-3, at 2 (1993) ("The employer must, in addition, employ at least 50 people within *a 75-mile radius* of the employee's worksite." (emphasis added)). For two reasons, we conclude that this does not evidence a clear congressional intent that the 75-mile distance be measured "as the crow flies." First, while the House and Senate Reports include the term "radius" on several occasions, they also omit the term numerous times. *See, e.g.,* H.R. Rep. No. 102-35(I), at 54 (1991) ("Title I would not apply to any employer of less than 50 workers if the total number of employees employed by that employer *within 75 miles* of

that worksite is less than 50." (emphasis added)); S. Rep. No. 102-68, at 45 (1991) ("The employees at . . . a worksite are not covered by the bill if the total number of those employed by the employer *within 75 miles* of the worksite is less than 50." (emphasis added)). This irregular use of the term is not sufficient to evidence a clear congressional intent. *See Miller v. Comm'r,* 836 F.2d 1274, 1282 (10th Cir. 1988) ("Though legislative history may be examined as a secondary source of a statute's meaning, the weight such history is given in construing a statute may vary according to factors such as whether the legislative history is sufficiently specific, clear and uniform to be a reliable indicator of intent."). Second, there is nothing in the legislative history to indicate that Congress, in the few instances in which it used the term "radius," was using that term in a technical, rather than a colloquial, sense. Consequently, we find more persuasive that Congress did not define a method of measuring the geographic proximity of two worksites and therefore left an implicit statutory gap that 29 U.S.C. § 2654 authorizes the Secretary of Labor to fill.

B. *Chevron Step Two*

When Congress leaves an implicit statutory gap, we simply ask "whether the [regulation] is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. Because invalidating an agency regulation is strong medicine, we will only do so when the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. "[T]he agency's interpretation need not be the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding." *Anderson v. U.S. Dep't of Labor,* 422 F.3d

1155, 1181 (10th Cir. 2005) (quoting *Salt Lake City v. W. Area Power Admin.*, 926 F.2d 974, 978 (10th Cir. 1991)).

Several factors support the reasonableness of 29 C.F.R. § 825.111(b) and lead us to conclude that it is consistent with the FMLA. First, the regulation represents a plausible and reasonable reading of the term "within 75 miles" contained in 29 U.S.C. § 2611(2)(B)(ii). Second, as noted, the regulation furthers the 50/75 provision's purpose in that a surface measurement is a reasonable proxy for judging an employer's ability to relocate an employee from one worksite to another in order to cover for an employee on FMLA leave. The FMLA recognizes that "if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee." *Harbert,* 391 F.3d at 1149. The use of surface miles is a fair, reasonably accurate and commonly-understood method of determining whether an employer has a significant pool of substitute workers nearby. Third, the regulation is not crafted in such a way that it unreasonably favors employers over employees. Rather, the regulation rationally furthers the FMLA's goal "to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). Finally, the only one of our sister circuits to consider the issue before us, the Fifth Circuit, has upheld 29 C.F.R. § 825.111(b) as consistent with the FMLA. *See Bellum,* 407 F.3d at 740 (holding that 29 C.F.R. § 825.111(b) is entitled to *Chevron* deference).

In an attempt to demonstrate that a surface measurement is arbitrary and capricious, Ms. Hackworth proffers several "real-world example[s]." First, she argues that 29 C.F.R. § 825.111(b) operates in an arbitrary manner because

"leave under [the] FMLA literally depends on how straight a road is." Aplt. Br. at 12. Ms. Hackworth points out that a company's employees could be ineligible for FMLA leave simply because they have the misfortune of being employed with a company whose worksites are located on a road that "zigs and zags." Ms. Hackworth also suggests that § 825.111(b) is arbitrary because an employee may suddenly lose eligibility for FMLA leave when a detour is created because a route between two worksites comes under construction, thereby rendering the driving distance between the two points greater than 75 surface miles. Finally, Ms. Hackworth points out that employees working in heavily populated areas are more likely to be eligible for FMLA leave under the DOL regulation than those working in sparsely populated areas, as a result of the greater number of public roads available to employees working in heavily populated regions.

Although Ms. Hackworth is correct that an employee's eligibility for FMLA leave could conceivably vary depending on how straight a particular road is, whether a particular road is under construction, or how many public roadways are located in a particular region, that does not render § 825.111(b) arbitrary and capricious. Rather, we see no reason why such considerations should not be factored into the eligibility calculus given the balance the FMLA strikes between the needs of an employee and the employer. Because the 50/75 provision was intended to protect employers who do not have a sufficient source of substitute employees nearby to cover for an absent employee, it is only logical that conditions which negatively affect the viability of moving an employee from one worksite to another may well come into play. This is true even if conditions such as the straightness of an interstate or the

presence of road construction may be occasionally determinative of an employee's eligibility status.

Finally, at oral argument, Ms. Hackworth's counsel argued that the arbitrariness of § 825.111(b) is demonstrated by the fact that courts, in analyzing the 100-mile limitation on service of process contained within Fed. R. Civ. P. 4(k) and in determining the relevant geographic market for antitrust liability purposes under the Sherman Act, measure distance "as the crow flies." *See Sprow v. Hartford Ins. Co.,* 594 F.2d 412, 417-18 (5th Cir. 1979) (holding that distance for purposes of Fed. R. Civ. P. 4[(k)] is to be measured "as the crow flies"); *Pierce v. Globemaster Baltimore, Inc.,* 49 F.R.D. 63, 66 (D. Md. 1969) (same); *Gordon v. Lewistown Hosp.,* 423 F.3d 184, 212 (3d Cir. 2005) (holding that the district court's use of a linear measurement in crafting the relevant geographic market was not clearly erroneous). This argument, though creative, is unavailing. The statutory purpose underlying the 50/75 provision and those underlying Fed. R. Civ. P. 4(k) and the Sherman Act are certainly not the same; therefore, the type of geographic measurement used with regard to Fed. R. Civ. P. 4(k) and the Sherman Act has little or no relevance to which measurement should be used with regard to the 50/75 provision. Moreover, even assuming the purposes underlying the three were similar, the question we must answer pursuant to *Chevron* is not whether we would employ a surface measurement in the first instance, *see Bellum,* 407 F.3d at 740 n.7 ("[T]he only question for us is whether the Secretary's construction of the statute is permissible, not the best."), but whether the DOL's use of a surface measurement is arbitrary, capricious, or contrary to the FMLA. We hold it is not.

Thus, Ms. Hackworth, in order to survive summary judgment, was required to produce evidence tending to show that Progressive employed at least 50 employees within 75 surface miles of its Norman worksite. Because Ms. Hackworth failed to rebut Progressive's evidence that it only employed 47 individuals within 75 surface miles of its Norman worksite, we affirm the district court's grant of summary judgment to Progressive because, at the time Ms. Hackworth requested FMLA leave, she was not an "eligible employee."

IV. Additional Arguments Regarding Eligibility

Ms. Hackworth makes two additional arguments in support of her eligibility for FMLA leave notwithstanding the 50/75 provision. First, she argues that the 75.6 surface mile distance between Progressive's Norman and Lawton worksites should be considered "within 75 miles," thereby rendering her eligible for FMLA leave. The common meaning, however, of the word "within" as being "below the number or amount mentioned" contradicts Ms. Hackworth's argument. Oxford English Dictionary Online (from the 2d print ed. 1989). In using the term "within 75 miles," Congress, at most, intended that, in order to be an eligible employee, one's employer must employ an aggregate of at least 50 people at worksites which are a distance of *75 miles or less* from one another. Being that the Norman worksite is 75.6 surface miles away from the Lawton worksite, those two worksites cannot be considered "within 75 miles" of one another.

Second, Ms. Hackworth asserts that the intent of the 50/75 provision "is not advanced by its application in this matter," and consequently, she requests that we make an

exception in this case and find that she is an eligible employee. She contends that application of the mileage limitation in this case does not advance the intent of the 50/75 provision because "Progressive is [in] no way prejudiced by conceivably having a Lawton employee drive an extra six-tenths of a mile to fill in for Hackworth at the Norman site" and because "Progressive could have filled Hackworth's position . . . with an employee from any of the offices in Oklahoma, . . . because the Norman site was not essential to Hackworth's job duties." Aplt. Br. at 21, 22. Even assuming, without deciding, that the intent of the 50/75 provision is not furthered by its application in this case, that in no way changes the fact that Congress included the 50/75 provision in the FMLA as a limitation on the class of eligible employees, and that the authority to create an additional exception to that provision lies with Congress, not the courts. *See Special Devices, Inc. v. OEA, Inc.*, 270 F.3d 1353, 1357 (Fed. Cir. 2001) ("If [] an exception is to be created, Congress, not this court, must create it."); *United States v. Petrov*, 747 F.2d 824, 826 (2d Cir. 1984) ("[W]e think it is for [C]ongress, and not this court, to create exceptions to [a] statute's clearly expressed, broad coverage.").

V. Additional Time for Discovery

Ms. Hackworth alternatively requests that we reverse the district court's decision and remand the case so that she may conduct additional discovery. Ms. Hackworth contends that the district court abused its discretion in denying her request for additional discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure because (1) additional discovery is needed to ensure that all of Progressive's Oklahoma employees are accounted for and

(2) the difference between her eligibility and non-eligibility is only three employees. Ms. Hackworth admits, however, that she failed to file an affidavit pursuant to Rule 56(f) in response to Progressive's motion for summary judgment. In an effort to convince us that she fully complied with Rule 56(f)'s dictates, Ms. Hackworth instead relies on statements made in her response brief to Progressive's motion for summary judgment and on an affidavit attached to her motion for reconsideration following the district court's grant of summary judgment. We must, therefore, determine whether these actions were sufficient to satisfy Rule 56(f) and whether the district court abused its discretion in denying additional discovery. *See Price ex. rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (holding that a district court's decision to deny relief under Rule 56(f) is reviewed for an abuse of discretion).

Rule 56(f) grants a court discretion to deny summary judgment or order a continuance when the nonmovant submits an affidavit averring that it possesses insufficient facts to oppose a summary judgment motion. Fed. R. Civ. P. 56(f).[6] The crux of Rule 56(f) is that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477

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[6] Rule 56(f) specifically provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

U.S. 242, 250 n.5 (1986). The nonmoving party, however, must expressly invoke Rule 56(f)'s protections and, in so doing, must satisfy certain requirements. *Price,* 232 F.3d at 783. More specifically, the nonmovant must submit an affidavit "identifying the probable facts not available and what steps have been taken to obtain these facts" and must "explain how additional time will enable him to rebut movant's allegations of no genuine issue of fact." *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992).

Here, Ms. Hackworth's statements, made in her response brief to Progressive's motion for summary judgment, to the effect that she "has not had a chance to review Progressive's payroll records to determine if the [employee] number represented . . . is correct or incorrect," are obviously insufficient to comply with Rule 56(f). *Cf. Pasternak v. Lear Petroleum Exploration, Inc.,* 790 F.2d 828, 833 (10th Cir. 1986) (holding that the statement "Although discovery has not yet been completed . . . " contained within the nonmovant's response brief was insufficient to comply with Rule 56(f)). These statements are not contained within an affidavit, do not explain what steps have already been taken to obtain information regarding the accuracy of Progressive's stated employee number, and do not explain how additional time will enable Ms. Hackworth to oppose Progressive's summary judgment motion. *See Campbell,* 962 F.2d at 1522 ("[C]ounsel's unverified assertion in a memorandum opposing summary judgment does not comply with Rule 56(f) and results in a waiver.").

Similarly, the affidavit of Ms. Hackworth's counsel attached to her motion for reconsideration, which was filed following the district court's grant of summary judgment,

is ineffectual because it was untimely. A nonmoving party wishing to invoke the protections of Rule 56(f) must attempt to do so by submitting an affidavit in direct response to a motion for summary judgment, not following the district court's disposition of that motion. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) ("[T]he nonmovant must carry its burden in the district court in a timely fashion pursuant to Rule 56(e) and *Celotex* or explain why it cannot pursuant to Rule 56(f). Otherwise, the nonmovant acts, or fails to act, at its peril." (internal citation omitted)). Rule 56(f) grants the district court the power to either deny a summary judgment motion or order a continuance; it does not grant the power to vacate a prior grant of summary judgment so that additional discovery can be conducted. *See* Fed. R. Civ. P. 56(f). Because Ms. Hackworth's statements in her response brief to the motion for summary judgment did not comply with Rule 56(f)'s requirements and the Rule 56(f) affidavit her counsel submitted was untimely, we conclude that the district court did not abuse its discretion in refusing to grant Ms. Hackworth additional time for discovery.[7] *See Pasternak*, 790 F.2d at 832-33 ("Where a

[7] In arguing that the district court prematurely granted summary judgment, Ms. Hackworth cites *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081-82 (10th Cir. 1985), inter alia, for the proposition that a party "should be given sufficient time to conduct discovery where relevant facts are exclusively in the control of the opposing party." Aplt. Reply Br. at 5. Ms. Hackworth, however, omits the *Weir* court's statement that, "There is no requirement in Rule 56, Fed. R. Civ. P., that summary judgment not be entered until discovery is complete." 773 F.2d at 1081. The *Weir* court additionally observed that "[i]n the absence of a Rule 56(f) affidavit, other courts have generally upheld the grant of summary judgment before the completion of discovery." *Id.* at 1083 n.10. Finally, whether evidence is within the exclusive control of the opposing party only becomes a factor, and not a controlling one, where the

(Continued on following page)

party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by Rule 56(f) by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate.").

AFFIRMED.

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nonmovant timely submits an affidavit which fully complies with Rule 56(f). *See id.* at 1083. Ms. Hackworth never submitted such an affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,	)	
Plaintiff,	)	
v.	)	
PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually,	)	**CIV-05-11-R**
Defendants.	)	

ORDER

Before the Court is Plaintiff's motion for reconsideration of this Court's Order of April 28, 2005. This motion is DENIED.

First, grounds warranting a motion to reconsider include an intervening change in the law, new evidence previously unavailable and the need to correct or prevent manifest injustice. *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). A motion to reconsider is not properly brought to revisit issues already addressed or advance arguments that could have been raised in prior briefing. *Id.*

Secondly, in ascertaining whether Congress expressed a clear intent as to the meaning of "within 75 miles" as used in 29 U.S.C. § 2611(2)(B)(ii), that is, how the 75-mile distance is to be measured, examination of the legislative history is proper. *See Harbert v. Healthcare Services Group,* 391 F.3d 1140, 1147 (10th Cir. 2004), *citing General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 124

S.Ct. 1236, 1248-49, 157 L.Ed.2d 1094 (2004). However, the reference in the House Report, 102-135, Part I, to "a geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities," H.R. Rep. No. 102-135 (I) at 37 (1991), which Plaintiff relies upon, is ambiguous and does not clearly express Congress' intent on the precise issue as to whether the 75-mile distance or 75-mile radius is to be measured in driving distance or as the crow flies. Accordingly, the Court properly proceeded to the second step of the *Chevron* analysis in its Order of April 28, 2005, and ultimately concluded that the regulation defining the 75-mile distance by surface miles over public roadways and waterways and, in the absence of available surface transportation, by airline miles, *see* 29 C.F.R. § 825.111(b), was entitled to controlling weight because it was not arbitrary, capricious or contrary to the statute.

Thirdly, the fact that MNS Maps measures the driving distance between the Norman worksite and the Lawton office as 75.6 miles does not create a genuine issue of material fact because even that distance exceeds the 75-mile distance specified in 29 U.S.C. § 2611(2)(B)(ii). Despite the seemingly harsh results, this Court is without authority to deviate from the 75-mile distance limitation or to ignore the .6 mile difference in distance (under MNS Maps) that a replacement employee from the Lawton office would have had to drive to fill in for the Plaintiff at the Norman office. *A fortiori,* the Court could not do so under the guise of advancing the purpose of the FMLA.

Plaintiffs request for additional time to conduct discovery directed to the number of employees that Defendant employed within 75 miles of Plaintiff's worksite at the relevant time is denied. Plaintiff could have invoked

Rule 56(f), F.R.Civ.P., when she filed her response to Defendant's motion for summary judgment but she did not do so, choosing instead to rely on her evidence of the distance between the Lawton and Norman offices "as the crow flies" to avoid summary judgment. Even now, Plaintiff has failed to submit an affidavit as required by Rule 56(f) and comporting with the requirements set forth by the Tenth Circuit, *see, e.g., Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000), although that failure was apparently inadvertent.

IT IS SO ORDERED this 5th day of May, 2005.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,	)	
Plaintiff,	)	
v.	)	
PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually,	)	**CIV-05-11-R**
Defendants.	)	

ORDER

Before the Court is Defendants' motion for summary judgment on the issue of subject matter jurisdiction. By this motion, Defendants challenge the factual basis for jurisdiction under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, relying on matters outside the pleadings to support their motion. They assert that because Defendant Progressive Casualty Insurance Company employs less than 50 employees at Plaintiff's former worksite in Norman, Oklahoma, and employs less than 50 employees within 75 miles of that worksite, Plaintiff is not an "eligible employee" under the FMLA and the Court is without subject matter jurisdiction under that Act.

Defendants properly filed their motion as one for summary judgment. When a defendant by a motion makes a factual attack on subject matter jurisdiction, relying on matters outside the pleadings, and the jurisdictional issue is intertwined with the merits, the motion is properly

treated as one for summary judgment. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 (10th Cir. 2002); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The jurisdictional question is intertwined with the merits if subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case. *Id.* The question of "eligible employee" status implicates both jurisdiction and the merits and a motion directed to such status which relies on matters outside the pleadings is properly filed as or treated as one for summary judgment. *See Morrison v. Amway Corp.*, 323 F.3d 920, 928 & 929-30 (11th Cir. 2003); *Knight v. Industrial Distribution Group, Inc.*, 2004 WL 2300477 at *2-3 (D.N.H. Oct. 12, 2004) (No. Civ. 04-182-SM); *Collinsworth v. Earthlink/Onemain, Inc.*, 2003 WL 22916461 at *1 & n. 1 (D. Kan. Dec. 4, 2003) (No. Civ. A. 03-2299GTV).

Defendants have submitted evidence that Defendant Progressive employs a total of 47 employees at its Norman, Oklahoma, worksite, where Plaintiff was employed, and its Oklahoma City worksite, which is within 75 miles of the Norman worksite, and that none of its other worksites in Oklahoma is within 75 miles of the Norman worksite, based upon Mapquest driving miles. Plaintiff, on the other hand, has produced evidence that Defendant Progressive's Lawton office is 67 miles from its Norman worksite, "as the crow flies," i.e., according to Geocode.com, and, according to Defendants' own evidence, it employs 3 employees at its Lawton worksite. Thus, Plaintiff has submitted evidence that she is not excluded from the definition of "eligible employee" because the total number of employees employed by Defendant Progressive within 75 miles of the worksite at which Plaintiff was employed when she requested FMLA leave was not "less

than 50." 29 U.S.C. § 2611(2)(B)(ii). *See* 29 U.S.C. § 2611(2)(A) (defining "eligible employee"). However, Plaintiff's evidence does not create a genuine issue of material fact as to whether the Court has jurisdiction and Plaintiff can establish her claims under the FMLA, because the Secretary of Labor's regulations implementing the FMLA provide that "[t]he 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed." 29 C.F.R. § 825.111(b). In the absence of available surface transportation between worksites, the distance is measured by the most frequently utilized mode of transportation, e.g., airline miles. *Id.* Congress in the FMLA did not express its intent as to how the 75-mile distance is to be calculated so the Court must give controlling weight to the agency's construction of the statute unless it is arbitrary, capricious or contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004). The Court concludes that the regulation defining "within 75 miles" comports with the common meaning or usage of that term and the purpose underlying 29 U.S.C. § 2611(2)(B)(ii), to exempt from FMLA coverage employees of employers who do not have a signified pool of employees nearby to cover for absent employees, *see Harbert v. Healthcare Services Group, Inc.*, 391 F.3d at 1149, who in most circumstances would have to drive to the worksite to do so. Moreover, the regulation defining how the 75-mile distance is calculated creates no arbitrary distinctions. Accordingly, the Court concludes that the regulation is not arbitrary, capricious or contrary

to the statute but is valid and entitled to controlling weight. *See id.* at 1149-51.

In accordance with the foregoing, no genuine issue of material fact exists. Defendant employs less than 50 employees at Plaintiff's worksite and less than 50 employees within 75 miles of Plaintiff's worksite, measured, as required by 29 C.F.R. § 825.111(b), in driving miles. Plaintiff was not an "eligible employee" under the FMLA, 29 U.S.C. §§ 2611(2)(A) & (B), there is no FMLA coverage and the Court is without subject matter jurisdiction. Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

IT IS SO ORDERED this 28th day of April, 2005.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KELLY HACKWORTH, Plaintiff-Appellant, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation; JERRY JOHNSON, individually, Defendants-Appellees.	No. 05-6198

ORDER

(Filed December 18, 2006)

Before **KELLY**, **HOLLOWAY**, and **McCONNELL**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: [Illegible]
Deputy Clerk

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No. 06-1300

Supreme Court, U.S.
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In The
Supreme Court of the United States

KELLY HACKWORTH,

Petitioner,

v.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRAD L. ROBERSON,
OBA No. 18819
(*Counsel of Record*)
PAUL M. KOLKER,
OBA No. 18749
PIGNATO, COOPER, KOLKER & ROBERSON, P.C.
1120 Robinson Renaissance
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3333
Facsimile: (405) 606-3334
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRAD L. ROBERSON,
OBA No. 18819
(*Counsel of Record*)
PAUL M. KOLKER,
OBA No. 18749
PIGNATO, COOPER, KOLKER & ROBERSON, P.C.
1120 Robinson Renaissance
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3333
Facsimile: (405) 606-3334
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Tenth Circuit correctly upheld regulation 29 C.F.R. § 825.111(b) as it directly parallels the stated purpose of the small operations exemption in the Family and Medical Leave Act.

II. Whether the Tenth Circuit correctly upheld regulation 29 C.F.R. § 825.111(b) where the statute is silent on the issue and the regulation is a permissible interpretation of the statute.

III. Whether the Tenth Circuit properly determined that Petitioner failed to timely utilize the protections of the Federal Rules of Civil Procedure, Rule 56(f).

PARTIES TO THE PROCEEDING

Petitioner:

(1) Kelly D. Hackworth
4107 West Pittsburg Circle
Broken Arrow, Oklahoma 74012

Respondents:

(1) Progressive Casualty Insurance Company
6300 Wilson Mills Road
Mayfield, Ohio 44143

(2) Jerry Johnson
Progressive Casualty Insurance Company
7666 East 61st Street, Suite 300
Tulsa, Oklahoma 74133

CORPORATE DISCLOSURE STATEMENT

Progressive Casualty Insurance Company states that The Progressive Corporation owns one hundred percent of Progressive Casualty Insurance Company's stock and is the only parent corporation of Progressive Casualty Insurance Company.

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment to the Respondents, Progressive Casualty Insurance Company ("Progressive") and Jerry Johnson ("Johnson") (hereinafter collectively referred to as "Respondents"), by determining that Respondents were excluded from the Family and Medical Leave Act's coverage pursuant to the small operations exemption contained therein. The United States Court of Appeals for the Tenth Circuit affirmed, reported at *Hackworth v. Progressive Cas. Ins. Company*, 468 F.3d 722 (10th Cir. 2006). The Tenth Circuit denied without opinion the Petition for Rehearing of Petitioner, Kelly Hackworth ("Petitioner").

JURISDICTION

The Tenth Circuit's November 14, 2006, Opinion renders this case reviewable pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This appeal involves the meaning of the term "miles" as stated in 29 U.S.C. § 2611(2)(B)(ii) of the Family and Medical Leave Act of 1993 ("F.M.L.A."), and the F.M.L.A. regulation which defines the term "miles" as surface transportation miles, 29 C.F.R. § 825.111(b).

STATEMENT OF THE CASE

As noted by the Tenth Circuit Court of Appeals in its thorough and well-reasoned November 14, 2006, opinion, the present case is nothing more than a game of "what-if . . . " In other words, Petitioner, a former disgruntled employee, wants a do-over. Specifically, after judgment was entered for Respondents, Petitioner, for the first time, made several arguments and requests, including requesting time to conduct discovery on the number of employees employed by Progressive within 75 miles of Progressive's Norman office. For the reasons set forth below, Petitioner's belated arguments and requests do not merit this Court's review.

Petitioner was continuously employed with Progressive from March 26, 1996, to June 22, 2004. In November 2003, Progressive operated a casualty unit located in Norman, Oklahoma, which was supervised in part by Petitioner. Petitioner reported directly to Johnson, who worked in Progressive's Tulsa office. Progressive also maintained a Lawton office and an Oklahoma City office.

In December 2003, Johnson evaluated the Oklahoma claims organization to ensure alignment with Progressive's desired goals. For example, one Progressive goal is to ensure most claims are handled by "generalist" claim representatives (persons who can handle both property damage and bodily injury claims), rather than "casualty" claim representatives (persons who can only handle bodily injury claims). Such action was in conformity with a company-wide initiative for claims representatives to become less specialized and to handle both the casualty and property damage features of a claim. Due to the push to use generalist representatives, there was less need for the casualty unit in Oklahoma.

As a result of Progressive's goal, a reorganization of the Oklahoma casualty operations became necessary in early 2004. Of course, because Petitioner's primary responsibility concerned the casualty unit, she was impacted by the reorganization, which included a change in job title. Even before the announced reorganization, Petitioner made it clear that she opposed the contemplated reorganization. For a multitude of reasons, Petitioner did not believe it was in her or Progressive's best interest to reorganize in the fashion Johnson envisioned.

In retaliation for initiating a reorganization, Petitioner began filing Charges of Discrimination with the Equal Employment Opportunity Commission against Progressive. She recruited other co-Progressive employees in the casualty unit to do the same.[1] Further, when advised that her job title would change as a result of the reorganization, Petitioner immediately requested time off under the F.M.L.A.[2] Eventually, Petitioner was terminated in June of 2004 because she refused to accept a change to her title or the severance. In response to the termination, Petitioner filed the instant litigation, asserting that

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[1] *See Diane F. Jones v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-867; *Terry J. Murphy-Rhude v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-902; and *Sandra L. Patterson v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-1095.

[2] Due to the job title change, Petitioner was offered a severance package, while on leave. Specifically, Petitioner took leave on March 19, 2004. On that date, there were 18 employees in Progressive's Norman office, 29 employees in Progressive's Oklahoma City office, and 3 employees in Progressive's Lawton office.

Progressive terminated her in violation of the F.M.L.A.[3] Not only do Petitioner's factual claims lack merit, but she did not even meet the threshold test for eligibility under the F.M.L.A. at the time she requested leave.

In response to Plaintiff's allegations, Respondents moved for Summary Judgment, asserting that Progressive employed only 47 employees within 75 surface miles of Petitioner's worksite, and that, therefore, the court did not have jurisdiction.[4] In her response brief, Petitioner stated that she "does accept [Respondents' payroll figures] and relies upon them for purpose of this response." (*See* Respondents' App., p.29.) Instead of attacking the validity of Respondents' payroll figures, Petitioner simply alleged that the 47 employees within 75 miles figure was incorrect because Respondents used a surface mile computation instead of a radius measurement. Respondents filed a reply brief, again asserting that the correct method of measuring distance in this scenario was surface mile

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[3] Petitioner also filed a separate lawsuit against Progressive on December 19, 2005. *See Kelly Hackworth v. Progressive Casualty Insurance Company*, United States District Court for the Western District of Oklahoma, Case No. 05-CV-1467. In that case, Petitioner asserted three causes of action: gender discrimination, hostile work environment and retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission. Interestingly, at trial, Petitioner was asked if there were any other reasons for her termination other than the three asserted causes of action set forth above (*i.e.*, whether she was terminated because she went on F.M.L.A. leave). Petitioner answered, "no." (*See* Transcript of the Proceedings, dated February 12-13, 2007, Respondents' App., p.35.)

[4] Petitioner erroneously alleges in her Petition that Respondents did not rely upon 29 C.F.R. § 825.111(b) in their Motion for Summary Judgment. (*See* Petition, p.4.) Nothing could be further from the truth. Respondents explicitly cited and relied upon 29 C.F.R. § 825.111(b) in their Motion for Summary Judgment. (*See* Respondents' App., p.14.)

measurement, pursuant to the Secretary of Labor's regulations, 29 C.F.R. § 825.111(b).

The District Court and Tenth Circuit agreed with Respondents' position. Specifically, the Tenth Circuit and the District Court determined that Progressive's Norman and Lawton worksites were more than 75 miles apart, and therefore, the aggregate number of employees within 75 miles of either worksite did not exceed 50. These determinations effectively removed Respondents from the F.M.L.A.'s coverage pursuant to the F.M.L.A.'s small operations exemption, 29 U.S.C. § 2611(2)(B)(ii). Petitioner disputes the determinations of the lower courts,[5] and asserts instead that the two worksites were less than 75 miles apart if the miles are measured using a linear or radius method, or "as the crow flies." However, the statute as enacted eliminates all references to a "radius" method of measuring the 75-mile distance. Furthermore, the accompanying regulation explicitly defines the distance as "surface miles, using surface transportation . . . " Although Petitioner questions the validity of this regulation, the Tenth Circuit's *Chevron*[6] analysis clearly establishes that the regulation is a permissible and valid interpretation of the statute which must, therefore, be afforded deference. Further, this appeal does not involve an issue of first impression; one other circuit has construed the term "miles" for purposes of the F.M.L.A.'s small operations

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[5] *After* the district court issued judgment for Respondents on April 28, 2005, Petitioner filed a Motion for Reconsideration attempting, *for the first time*, to rely upon a Rule 56(f) affidavit. The District Court denied this Motion. Petitioner also disputes the lower courts' refusal to allow her to conduct discovery on the issue after judgment was entered.

[6] *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

exemption, and its decision was in accordance with the Tenth Circuit's decision.[7] Therefore, this dispute does not present a fundamental issue or conflict necessitating review by this Honorable Court.

REASONS FOR DENYING THE PETITION

I. Regulation 29 C.F.R. § 825.111(b) and the Tenth Circuit's Decision Do Not Conflict with the Decisions of Other Courts or History and Intent of the F.M.L.A.

Petitioner contends that Congress' intent to use a radial method of measurement is demonstrated throughout the legislative history of the Act, and that, accordingly, the District Court and Tenth Circuit should have struck down the F.M.L.A. regulation that defines "miles" as surface miles. Admittedly, certain Senate and House Reports refer to a 75-mile "radius,"[8] but Congress deleted

[7] *See Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1150, 153 L.Ed.2d 1002 (U.S. Jan. 17, 2006) (No. 05-640).

[8] House Report No. 102-135(I) (1991) is approximately 89 pages, single spaced. In this voluminous report, the word radius is only mentioned one time. However, in the same House Report, the House defined an eligible employee as "any employee of an employer employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within *75 miles* of that worksite is less than 50." *See Title I – General Requirement for Leave, Sec. 101. Definitions*, at p. *3 (emphasis added). As seen from this language, there is a complete omission of the word radius. This same type of language (*i.e.*, language which avoids the use of the word "radius") occurs in Sec. 104(b)(2), Employment and Benefits Protection, at p. *5. ("An eligible employee described in this paragraph is a salaried eligible employee who is among the highest paid 10

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these references from the F.M.L.A. as enacted. Pursuant to *Russello v. United States,* the references to "radius" lost all meaning upon their deletion by Congress, thereby permitting a presumption that the prior language was not intended to apply to the final version of the Act.[9] Because the references to "radius" no longer delimit the term "miles," Petitioner cannot assert that that the deleted references constitute "clear" Congressional intent.

In addition, after deleting from the F.M.L.A. all references to a 75-mile "radius," Congress refrained from clearly defining or otherwise expressing its intended method of measuring "miles." Therefore, Congress has not "directly spoken to the precise question at issue" within the meaning of *Chevron.* Rather, the statute "is silent or ambiguous with respect to the specific issue" in this case. Since the statute itself fails to express a "clear" Congressional intent to define the term "miles" as surface miles or

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percent of the employees employed by the employer *within 75 miles* of the facility at which the employee is employed." (Emphasis added)).

Senate Report No. 103-3 (1993), just as House Report 102-135, provides no clear intent on the issue. Specifically, Senate Report 103-3 addresses the mileage issue seven times in fifty-six single spaced pages. Of those seven times, the Senate Report used the phrase "75-mile radius" four times and the phrase "75 miles" three times. Importantly, within *Title IV. Committee View*, at pp. *23 and *31, the Senate Report twice states "within 75 miles" as opposed to using the phrase "within a 75-mile radius" only once (p. *23).

A similar pattern is found in Senate Report No. 202-68 (1991).

[9] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States,* 464 U.S. 16, 23-24, 104 S. Ct. 296, 301, 78 L.Ed.2d 17 (1983); *Arizona v. California,* 373 U.S. 546, 580-81, 83 S. Ct. 1468, 1487-88, 10 L.Ed.2d 542 (1963).

as linear miles,[10] it cannot be said that the regulation, or the Tenth Circuit's decision upholding it, conflicts with the clear intent of Congress.

Lastly, neither the regulation nor the Tenth Circuit's decision conflict with other district or circuit courts. The Tenth Circuit and the Fifth Circuit's *Bellum* analysis of the term "miles" as stated in the F.M.L.A. small operations exemption *stand as the only authority* on this precise issue. No district court has addressed the provision at issue, other than in dicta or other colloquial language,[11] and no other circuit has analyzed the proper method of measuring "miles" in this regard. Therefore, no circuit split exists at this time, and there is no emerging minority view to create a circuit split. Accordingly, it cannot be said that another court would reach a different result on the same or similar facts.

II. The Tenth Circuit's *Chevron* Analysis Correctly Concluded That the Regulation Is a Permissible and Valid Interpretation of the Statute

Petitioner contends that the regulation is not a permissible construction of the F.M.L.A. under the second prong of *Chevron*,[12] which applies when Congress has left

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[10] Petitioner readily conceded this issue at oral argument before the Tenth Circuit. (*See* Petitioner's Appendix, p.9a.)

[11] For example, on pages 7-8 of her Petition, Petitioner references 12 cases that mention a "75-mile radius," but none of the cases address the issue of how miles should be measured for the application of the small operations exemption.

[12] Petitioner also contends that the Secretary of Labor exceeded his authority by altering the coverage of F.M.L.A. leave. In doing so, Petitioner erroneously leads the Court to believe that this regulation has a similar effect to the regulation at issue in *Ragsdale v. Wolverine*

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an explicit or implicit gap in the statutory language, or when "the statute is silent or ambiguous with respect to the specific issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Under the second prong of the analysis, the court must simply determine "whether the agency's answer is based on a permissible construction of the statute," and in doing so, the court must consider only whether the regulation is arbitrary, capricious, or manifestly contrary to the statute. *Id.*

In the case at bar, the statute fails to define the intended method of measuring "miles," and pursuant to *Russello*, the historical references to a 75-mile "radius" lost all meaning when Congress eliminated said references from the Act. Since the statute is "silent or ambiguous" as to the proper measurement of "miles," the Tenth Circuit analyzed the accompanying regulation under the *Chevron* doctrine and concluded the Secretary's construction of the F.M.L.A. provision is a permissible interpretation of the statute based upon the stated purpose of the small operations exemption.

Congress included in the F.M.L.A. a small employer exemption that excludes from coverage any employer with less than 50 employees, but separately provided an exclusion for "a potentially large company with a relatively small satellite office in a particular area." *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 356, 163 L.Ed.2d 65

World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 152 L.Ed.2d 167 (2002), which imposed certain notice requirements not required by statute. The Fifth Circuit in *Bellum* disposed of this contention in footnote 5 of its decision.

(U.S. Oct. 3, 2005) (No. 04-1647).[13] The specific purpose of this separate exclusion for small operations was to recognize and accommodate the difficulties and concerns employers face in reassigning workers to geographically separate facilities. *Id.*, quoting H.R. Rep. No. 102-135(I) at 37 (1991). The Tenth Circuit opined in *Harbert* that in enacting the small operations exemption, Congress "determined that if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide F.M.L.A. leave to that employee."[14] *Id.* at 1149 (emphasis in original).

This purpose clearly focuses on reassigning employees to geographically separate facilities during another employee's F.M.L.A. leave (twelve weeks maximum). A temporary reassignment of this nature inevitably requires transporting the replacement employee to and from the geographically separate facility. The regulation defining "miles" as "surface miles, using surface transportation" thus reasonably contemplates the inevitable consequences of an employee's temporary reassignment to cover for another employee on F.M.L.A. leave. Therefore, one cannot

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[13] In this case, the Tenth Circuit reviewed the agency's interpretation of the term "worksite" where Congress failed to define the term. Though the terms "worksite" and "miles" both appear in 29 U.S.C. § 2611(2)(B)(ii), the small operations exemption, the Tenth Circuit did not analyze the method of measuring "miles." The court did, however, discuss at length the stated purpose of the exemption.

[14] This is precisely the situation in the case at bar. Progressive did not have a significant pool of employees nearby who could have traveled less than 75 miles by surface transportation to cover for Petitioner during her F.M.L.A. leave. The Tenth Circuit recognized this practical problem as precisely the difficulty that Congress intended to accommodate for employers.

justifiably contend that the regulation at issue is arbitrary, capricious or manifestly contrary to the F.M.L.A. when considered in conjunction with the stated purpose of the small operations exemption.[15] Accordingly, the Tenth Circuit correctly concluded that the regulation is at least a permissible interpretation of the statute, and that it is, accordingly, entitled to deference.

The more general purpose of the exemption is to relieve small employers from the burdens imposed by the F.M.L.A. In 1991, Congress explained:

> [The Act] covers only employers with fifty or more employees. The exemption of employers with less than fifty employees means that 95% of all employers are excluded from the coverage of the bill. . . . While concerned about the low coverage figures, the Committee, *in recognition of the particular problems faced by small employers*, approved this provision which exempts the small employer while providing coverage for workers employed by medium and large sized companies.

H.R. Rep. No. 102-135(I), at 37 (1991) (emphasis added). *See also* H.R. Rep. No. 101-28(I), at 24 (1989). Congress clearly contemplated and accepted the scope of the exemption granted to employers such as Progressive who employ less than 50 employees within 75 miles. Congress firmly

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[15] Petitioner's only arguments for striking this regulation are (1) the term "radius" can be found in Senate and House reports; and (2) the term "radius" can be found in numerous court opinions. However, the term "radius" is not located in the Act itself, and all courts that have used the term "radius" when citing the statute have done so colloquially or in mere dicta. None of the cited opinions analyzed the proper method of measuring "miles" or actually applied a 75-mile "radius" under the F.M.L.A. exemptions.

delineated the exemption at 50 employees, thereby declaring that any employer with less than 50 employees within 75 miles of the worksite shall not be burdened by the requirements of the F.M.L.A. It is undisputed that Progressive did not employ 50 employees within 75 miles of Petitioner's worksite. Thus, Progressive exemplifies the small operation that Congress specifically intended to exclude from the burdens of the F.M.L.A.

III. The Tenth Circuit Opinion is Reasonable and Does Not Fail to Apply Existing Law

Petitioner argues that the Tenth Circuit failed to adhere to Federal Rule of Civil Procedure 4 and cases interpreting 15 U.S.C. § 1293, which use a "radius" method to measure distance. However, the specific purpose of this exemption, separate and apart from all others, is to alleviate the difficulties faced by employers when reassigning employees to geographically separate facilities. In other words, as aptly stated by the Tenth Circuit:

> The statutory purpose underlying the 50/75 provision and those underlying FED. R. CIV. P. 4(k) and the Sherman Act are certainly not the same; therefore, the type of geographic measurement used with regard to FED. R. CIV. P. 4(k) and the Sherman Act has little or no relevance to which measurement should be used with regard to the 50/75 provision. Moreover, even assuming the purposes underlying the three were similar, the question we must answer pursuant to *Chevron* is not whether we would employ a surface measurement in the first instance, *see Bellum*, 407 F.3d at 740 n.7 ("[T]he only question for us is whether the Secretary's construction of the statute is permissible, not the best."), but whether

> the DOL's use of a surface measurement is arbitrary, capricious, or contrary to the F.M.L.A. We hold it is not.

Hackworth, 468 F.3d at 730.

Lastly, Petitioner contends that the Tenth Circuit failed to apply existing law. Though Petitioner cites twelve cases in which the term "radius" can be found, Petitioner acknowledges that no court has determined this issue – save the court in *Bellum*. Those twelve cases referencing the word "radius" contain nothing more than *dicta*. The Tenth Circuit clearly did not fail to apply existing law, for there is no existing law (in Petitioner's favor) to be applied.

IV. The Issue Presented on Appeal Does Not Constitute an Issue of National Importance

There exists no circuit split on this particular issue, and there is no emerging minority view to create a circuit split. The Tenth Circuit and Fifth Circuit are the only circuits that have opined on the definition of "miles" in 29 U.S.C. § 2611(2)(B)(ii) and on the validity of 29 C.F.R. § 825.111(b), and they are in agreement. If Congress deems the Tenth or Fifth Circuit opinions an unwarranted interpretation of the statute or the regulation, it can easily amend the statute to express its intended method of measuring miles. This response is unlikely, however, considering that the regulation defining "miles" as surface miles has existed since 1995 without further comment or action from Congress. Because remedies short of judicial review are available to settle a circuit split should one arise, it is not necessary to grant a Writ of Certiorari.

V. The District Court and the Tenth Circuit Properly Refused Petitioner's Untimely Request to Conduct Additional Discovery

The crux of Petitioner's appeal is that the lower courts should have allowed her to rely upon a Rule 56(f) affidavit *after* judgment was entered. It is undisputed Petitioner never asked – even implicitly – for more time to conduct discovery on the issue of whether Progressive's payroll records (which demonstrated the number of employees at each location) were correct before the District Court issued its April 28, 2005, Order granting Respondents' Motion for Summary Judgment. Subsection (f) of Fed. R. Civ. P. 56 provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

It is undisputed that Petitioner did not take advantage of this procedural mechanism when responding to the Motion for Summary Judgment of Respondent. The record is clear that Petitioner did not offer, or otherwise reference, an affidavit explaining the unavailability of facts necessary to oppose Respondents' Motion for Summary Judgment. (*See* Petitioner's App., pp.22-33.)

This Court has made it crystal clear that Petitioner had three options when responding to Respondents' Motion for Summary Judgment. One of those options was to submit an affidavit explaining why further discovery is necessary, pursuant to Rule 56(f). *See Celotex Corp. v.*

Catrett, 477 U.S. 317, 333, n.3, 106 S. Ct. 2548, 2558 (1986). The purpose of Rule 56(f) is to defeat or stay summary judgment motions when the adverse party has not had an opportunity to discover information necessary to oppose the motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, n.5, 162 S. Ct. 2505, 2511 (1986). "However, Rule 56(f) does not operate automatically. Its protections must be invoked and can be applied only if the party satisfies certain requirements." *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000). If an opposing party fails to take advantage of the protections of Rule 56(f), there is no abuse of discretion in granting summary judgment if it is otherwise appropriate. *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986); *Shavrnoch v. Clark Oil and Refining Corp.*, 726 F.2d 291, 294 (6th Cir. 1984); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790 (1979).

It is undisputed Petitioner did not assert in her Response to the summary judgment that she needed time to conduct discovery before responding, much less attach the appropriate affidavit. (*See* footnote 5, *supra*.) Rather, Petitioner made a strategic decision not to request additional time to conduct discovery before filing a response brief. In fact, every statement contained within her Motion for Reconsideration could have been made to the district court when responding to the Motion for Summary Judgment. Petitioner chose the manner in which to respond to Respondents' motion, and Petitioner apparently believed that she could defeat Respondents' motion without conducting discovery. If this Court were to rule in Petitioner's favor, it would set the dangerous precedent that a plaintiff

can always have two bites at the apple during the dispositive motion stage of litigation. In other words, if Petitioner's logic is adopted, a plaintiff will have no incentive to determine, up front, whether additional discovery is needed. Instead, a plaintiff will not make this determination until it has received an adverse ruling on a dispositive motion, at which time the Plaintiff will simply ask for a "reconsideration." Obviously, neither the Federal Rules of Civil Procedure nor common sense allow for such an absurd result.

Essentially, Petitioner takes issue with the fact that Respondents moved for summary judgment prior to the status conference. However, Petitioner fails to remember or acknowledge that Respondents had the ability to file their motion for summary judgment "at any time." *See* Fed. R. Civ. P., Rule 56(b). In other words, there is no grace period a defendant must endure before seeking relief under Rule 56. Thus, Petitioner's reliance upon *Celotex* and *Anderson* is completely misplaced. In fact, this court in *Celotex* specifically stated if a party opposing summary judgment feels they have been "railroaded" by a premature motion for summary judgment, the protections of Rule 56(f) may be invoked. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2554 (1986). There is no question that a party should be entitled to sufficient time to conduct discovery in response to a dispositive motion – if such a request is made before judgment is entered.

Again, Petitioner fails to cite a single case to support her position that a Rule 56(f) affidavit can be utilized after judgment is entered. Because there is no circuit split on this particular issue and the Tenth Circuit's opinion does not conflict with any of this Court's holdings, it is not necessary to grant a Writ of Certiorari.

CONCLUSION

The F.M.L.A. is silent as to the proper method of measuring "miles" as stated in the F.M.L.A.'s small operations exemption, and historical references to a 75-mile "radius" lost all significance when Congress deleted the term from the final version of the Act. The accompanying regulation that defines "miles" as "surface miles, using surface transportation" directly parallels the stated purpose of the F.M.L.A.'s small operations exemption – namely, to reassign employees to geographically separate facilities while another employee takes F.M.L.A. leave. Therefore, the regulation is not arbitrary, capricious or manifestly contrary to the statute. Accordingly, the Tenth Circuit's decision upholding the regulation as a permissible interpretation of the statute should be upheld, particularly since no other district court or court of appeals has rendered a contrary decision. Further, Petitioner clearly failed to timely invoke the protection of Rule 56(f). For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRAD L. ROBERSON, OBA No. 18819
(*Counsel of Record*)
PAUL M. KOLKER, OBA No. 18749
PIGNATO, COOPER, KOLKER
& ROBERSON, P.C.
1120 Robinson Renaissance
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3333
Facsimile: (405) 606-3334
Attorneys for Respondents

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH, Plaintiff, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation, and JERRY JOHNSON, individually, Defendants.	Case Number: CIV-05-11-R

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

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Gerard F. Pignato, OBA No. 11473
Brad L. Roberson, OBA No. 18819
PIGNATO & COOPER, P.C.
1120 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3333
Facsimile: (405) 606-3334

ATTORNEYS FOR DEFENDANTS

March 29, 2005

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H.R. Rep. No. 102-135, (1), at 37 (1991) 7

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and LCvR 56.1, Defendants, Progressive Casualty Insurance Company ("Progressive") and Jerry Johnson ("Johnson") (collectively referred to as "Defendants"), move the Court for summary judgment in their favor and against Plaintiff, Kelly Hackworth ("Plaintiff"), for the

reason that this Court lacks subject matter jurisdiction.[1] In support thereof, Defendants submit the following brief.

DEFENDANTS' STATEMENT OF UNDISPUTED, MATERIAL FACTS

1. Plaintiff was an employee of Progressive from March 26, 1996, to June 22, 2004. (*See* Affidavit of Amy Harland, ¶ 3, attached as **EXHIBIT A**.)

2. Plaintiff alleges she requested time off from work with Progressive Lander the Family Medical Leave Act on March 19, 2004. (*See* Plaintiff's Complaint, ¶ 8.)

3. Plaintiff's worksite on March 19, 2004, was located at 2420 Springer Drive, Norman, Oklahoma 73069. (*See* Affidavit of Amy Harland, ¶ 4, **EXHIBIT A**.)

4. On March 19, 2004, Progressive employed 47 employees within 75 surface miles of 2420 Springer Drive, Norman, Oklahoma 73069. (*See* Affidavit of A. Harland, ¶ 17, **EXHIBIT A**.)

5. As of March 19, 2004, there were six Progressive field offices in Oklahoma. The field offices were in Oklahoma City, Tulsa, Enid, Norman, Lawton, and Muskogee. (*See* Affidavit of Amy Harland, ¶ 7, **EXHIBIT A**.)

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[1] As described below, it is not entirely clear whether a Rule 12(b)(1) motion to dismiss based upon the same facts relied upon herein would be converted to a motion for summary judgment. Defendants have proceeded herein as if a conversion would be made, and have titled this Motion accordingly. However, out of an abundance of caution and for procedural purposes, Defendants also move, in the alternative, for dismissal under Fed. R. Civ. P., Rule 12(b)(1).

6. On March 19, 2004, the Oklahoma City office was located at 9211 Lake Hefner Parkway, Suite 200, Oklahoma City, Oklahoma 73120. (*See* Affidavit of Amy Harland, ¶ 8, **EXHIBIT A**.)

7. On March 19, 2004, the Tulsa office was located at 10830 East 45th Street, Tulsa, Oklahoma. (*See* Affidavit of Amy Harland, ¶ 9, **EXHIBIT A**.)

8. On March 19, 2004, the Enid office was located at 124 North Oakwood Road, Enid, Oklahoma 73073. (*See* Affidavit of Amy Harland, ¶ 10, **EXHIBIT A**.)

9. On March 19, 2004, the Norman office was located at 2420 Springer Drive, Norman, Oklahoma 73072. (*See* Affidavit of Amy Harland, ¶ 11, **EXHIBIT A**.)

10. On March 19, 2004, the Lawton office was located at 1315 Northwest Sheridan Road, Lawton, Oklahoma. (*See* Affidavit of Amy Harland, ¶ 12, **EXHIBIT A**.)

11. On March 19, 2004, the Muskogee office was located at 2421 South York, Suite 14, Muskogee, Oklahoma 74403. (*See* Affidavit of Amy Harland, ¶ 13, **EXHIBIT A**.)

12. Progressive's Oklahoma City office is 31.47 surface miles from the Norman office. (Mileage computed by Map quest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT B**.)[2]

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[2] *See In re Extradition of Gonzalez*, 52 F.Supp.2d 725, 731 (W.D. La 1999) (judicial notice taken of Mapquest's surface mile distance between two fixed points).

13. The Tulsa office is 129.02 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT C.**)

14. The Enid office is 120.17 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT D.**)

15. The Lawton office is 79.8 surface miles from the Norman office. (Mileage computed by MSN Maps (http://www.mappoint.msn.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT E.**[3])

16. The Muskogee office is 149.68 surface miles from the Norman office. (Mileage computed by Mapquest (http://www.mapquest.com) as shortest driving distance between the two offices; *see* print off of driving directions, attached as **EXHIBIT F.**)

17. The only Progressive field office within 75 surface miles of the Norman office on March 19, 2004, was the Oklahoma City office. (*See* Affidavit of Amy Harland, ¶ 14, **EXHIBIT A.**)

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[3] When computing the distance between Lawton and Norman, Mapquest did not recognize the shortest distance between the two offices (Mapquest referenced 89.22 miles from Norman to Lawton). Specifically, Mapquest did not recognize that The Bailey Spur opened in 2003, giving a more direct route of travel from Norman to Lawton. MSN Maps recognizes The Bailey Spur short cut.

STATEMENT OF THE CASE

This case arises out of Defendants' alleged violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. Specifically, on January 4, 2005, Plaintiff filed a Complaint against her former employer, Progressive, raising a single cause of action: FMLA interference, restoration and discrimination.

In her Complaint, Plaintiff alleges that beginning **March 19, 2004,** her mother was hospitalized for two weeks. (*See* Complaint, ¶ 7.) Plaintiff further alleges that, on the first day of her mother's hospitalization, she requested leave from her employer, Progressive, under the FMLA. (*See* Complaint, ¶ 8.) Plaintiff alleges that, immediately after she made her FMLA request, Johnson, her direct supervisor, offered Plaintiff either a job demotion or a severance package. (*See* Complaint, ¶¶ 6 and 9.) Plaintiff's last substantive allegation is that when her FMLA leave expired on June 1, 2004, she was not offered a return to work in her current or an equivalent position. (*See* Complaint, ¶¶ 14 and 34.) For jurisdictional purposes, Plaintiff also alleges that she worked at a location where at least 50 employees were employed by Progressive within 75 miles. (*See* Complaint, ¶ 29.) As set forth below, this jurisdictional averment is simply untrue.

ARGUMENTS AND AUTHORITIES

STANDARD OF REVIEW

A. Rule 12(b)(1) Motion to Dismiss

It is well known that Fed. R. Civ. P., Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *See Holt v. United States of America,* 46

F.3d 1000, 1002 (10th Cir. 1995). First, a defendant may make a facial attack on the complaint's allegations as to subject matter jurisdiction, which questions the sufficiency of the complaint. *Id.* But, in reviewing a facial attack on the complaint, the district court must accept the allegations of the complaint as true. *Id.*

A *factual* attack, on the other hand, challenges the existence of subject matter jurisdiction in fact, irrespective of what the plaintiff alleges in the pleadings. When a factual attack is made, matters outside the pleadings, such as testimony and affidavits, maybe considered. *Id.* at 1003. Thus, when reviewing a factual attack on subject matter jurisdiction, "a district court may not presume the truthfulness of the complaint's factual allegations." *Id.* In such a case, the court's reference to matters outside the complaint does not convert the motion to a motion for summary judgment under Fed. R. Civ. P. 56. *Id.* "However, a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Id.* If subject matter jurisdiction is dependant on the same statute which provides the substantive claim in the case, the jurisdictional question is intertwined with the merits of the case. *Id.* at 1003. In the case at bar, Defendants are mounting a factual challenge, with supporting evidence, to the existence of subject matter jurisdiction, and Defendants are relying on the same Act (FMLA) to challenge jurisdiction. Accordingly, it can be argued that Defendants' jurisdictional challenge appears to be intertwined with the merits of the case. Thus, Defendants will proceed herein as if the Rule 56 standard applies as opposed to the Rule 12(b)(1) standard.

B. Rule 56 Motion for Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P., Rule 56(c). The district court, when applying this standard, views the evidence and makes reasonable inferences from the evidence in the light most favorable to the non-moving party. *Byers v. City of Albuquerque,* 150 F.3d 1271, 1274 (10th Cir. 1998). The movant must show the absence of a genuine issue of material fact, but the movant is not required to negate the non-movant's claim. *Jenkins v. Wood,* 81 F.3d 988, 990 (10th Cir. 1996). When the movant carries this burden, the non-movant may not rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof. *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir. 1999). An issue of material fact is genuine only if a non-movant presents facts such that a reasonable jury could find in favor of the movant. *Id.*

A challenge of the sufficiency of Federal subject matter jurisdiction can be properly raised in a Rule 12(b)(1) motion, or as a Rule 56 motion for summary judgment. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 (10th Cir. 2002). Thus, regardless which standard this Court employs, Defendants submit that this Court lacks subject matter jurisdiction for the reasons set forth below.

SUMMARY OF THE ARGUMENT

The FMLA defines "employer" to include any person engaged in commerce employing 50 or more employees. *See* 29 U.S.C. § 2611(4). However, Congress specifically excluded from coverage under the FMLA "any employee of an employer who is employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." *See* 29 U.S.C. § 2611(2)(B)(ii). The requisite number of employees is based on the number of employees maintained on the payroll at the time the employee gives notice of the need for leave. 29 C.F.R. §§ 825.111(c) and 825.110(f).

Here, although Progressive employs more than 50 employees nationwide, it employed only 47 employees at or within 75 miles of where Plaintiff worked on March 19, 2004 (the date Plaintiff requested leave under the FMLA). (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A**.) Thus, the plain language of the FMLA clearly excludes Plaintiff from coverage under the Act. As a non-eligible employee under the FMLA, Plaintiff is prohibited from advancing a claim for either FMLA discrimination or retaliation before this Court because it lacks subject matter jurisdiction.

PROPOSITION: THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S FMLA CLAIM.

A. General Overview of the FMLA

The purpose of the FMLA is to balance the demands of the workplace with the needs of employees to take leave from work because of medical conditions or compelling family needs, such as the care of a parent. *See* 29 U.S.C.

§ 2601(B). Thus, the FMLA allows eligible employees to take up to 12 weeks of unpaid leave for qualifying reasons, and ensures that they will be restored to their former positions upon return to work. *See* 29 U.S.C. §§ 2612 and 2614(a)(1). The FMLA provides a private right of action allowing employees to recover damages and seek equitable relief from employers who violate the FMLA. *See* 29 U.S.C. § 2617(a)(1).

In consideration of the employer's interests, Congress limited the effect of the FMLA on small businesses, perhaps due to "Congress' desire not to burden small businesses by requiring them to operate without employees for an extended period of time or their determination that the effect upon commerce from the small companies is diminimus. . . . " *Douglas v. E. G. Baldwin & Assoc., Inc.*, 150 F.3d 604, 608 (6th Cir. 1998). Further, as part of a compromise in passing the FMLA legislation, Congress drafted an additional exception, which was created for "small operations" – that is, a potentially large company with a relatively small satellite office in a particular area. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004). This provision was designed to accommodate employer concerns about "the difficulties that an employer might have in reassigning workers to geographically separate facilities." *Id.*, quoting *H.R. Rep.* No. 102-135, (1), at 37 (1991).[4] With these eligibility restrictions, "Congress recognized that only about 40-50

[4] In other words, it might be reasonable to expect an employer to relocate workers from nearby facilities for the period of a FMLA leave (such as reassigning someone temporarily from Oklahoma City to Norman), but it would be understandably more difficult to reassign an employee from Tulsa to work in Norman for three months.

percent of all employees would be covered by the Act." *Harbert,* 391 F.3d at 1148, citing *S. Rep.* No. 102-68, at 24 (1991).

Coupled with the eligibility restrictions set forth above are strict numerical requirements set forth in the FMLA's definitions of covered employers and qualified employees. *See Grimsley v. Fiesta Salons, Inc.,* 2003 WL 117985, *4 (E.D. Mich. Jan. 7, 2003). For example, the term "employer" means:

> any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

29 U.S.C. § 2611(4)(A)(i).

Further, the term "employee" is defined as one who has worked for a covered employee for at least 12 months and at least 1,250 hours during the previous 12 months. But, the FMLA excludes:

> any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

29 U.S.C. § 2611(2)(B)(ii).

In this case, Progressive does not dispute that it is a covered employer inasmuch as its national workforce exceeds 50 workers. However, Progressive did not employ 50 or more people within 75 miles of Progressive's Norman field office where Plaintiff was employed on March 19, 2004. In other words, Progressive, "a large employer with

geographically dispersed employees, is precisely the type of employer Congress intended to protect with its enactment of the 50/75 provision." *Harbert,* 391 F.3d at 1150.

B. Standards for Determination of Whether a Person Qualifies as An "Employee" Under the FMLA Pursuant to 29 U.S.C. § 2611(2)(B)(ii)

Congress granted the Secretary of Labor the authority to prescribe regulations necessary to carry out the FMLA. *See* 29 U.S.C. § 2654. Thus, in order to determine how many employees an employer employs, for purposes of the FMLA, reference must be made to the Department of Labor's FMLA regulations. *See* 29 C.F.R. §§ 825.100-.800 (2002). In that regard, 29 C.F.R. § 825.110(f) specifically states, "[W]hether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined *when the employee gives notice* of the need for leave." (Emphasis added.) The purpose of this "is to fix the date for determination of an employee's eligibility for FMLA benefits, and to protect employees who qualify for leave when the request is made from losing eligibility if there is a reduction in the workforce thereafter." *See Grimsley,* 2003 WL 117985 at *4. Further, the distance of 75 miles is to be calculated in surface miles using available transportation, by the most direct route. *See* 29 C.F.R. § 825.111(b). Thus, for Plaintiff to be an eligible employee under the FMLA, Progressive must have employed 50 or more workers within 75 surface miles of the Norman field office on March 19, 2004.

Also, the Court is to apply the "payroll method" in assessing whether an entity employs 50 or more employees within 75 miles of the worksite. *See* 29 C.F.R. § 825.111(c); *see also Walters v. Metropolitan Educational*

Enterprise, Inc., 519 U.S. 202, 206-207 (1997) (the payroll method is the preferred method to determine employee status). Finally, "an employee's worksite under the FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned." 29 C.F.R. § 825.111(a).

C. Application of FMLA Standards to the Present Case

Plaintiff alleges she requested time off from work with Progressive under the Family Medical Leave Act on March 19, 2004. (*See* Plaintiff's Complaint, ¶ 8.) On March 19, 2004, Plaintiff's worksite with Progressive was located at 2420 Springer Drive, Norman, Oklahoma 73072. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 3.) As of March 19, 2004, neither Progressive nor Johnson employed 50 or more persons within a 75-mile distance of Progressive's Norman, Oklahoma, office. Amy Harland ("Harland"), a human resources manager at Progressive, verifies this fact. (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A.**)

More specifically, Progressive's only other field office within 75 surface miles of Plaintiff's worksite in Norman, Oklahoma, is located at 9211 Lake Hefner Park, Oklahoma City, Oklahoma. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 17.) Thus, Progressive's other field offices in Oklahoma – Tulsa, Muskogee, Lawton and Enid – cannot be considered in the FMLA jurisdictional analysis; only Norman (Plaintiff's worksite) and Oklahoma City can be considered.

Harland reviewed Progressive's March 27, 2004 payroll ledger for Oklahoma. (*See* Affidavit of Amy

Harland, ¶ 5, **EXHIBIT A.**) The payroll ledger demonstrates that, between March 14 and March 27, 2004, Progressive employed 101 persons within Oklahoma. (*See* ledger attached as **EXHIBIT G.**) Harland also reviewed pertinent computer personnel file information on each Oklahoma employee and/or spoke with Progressive employees to confirm each employee's worksite as of March 19, 2004. (*See* Affidavit of Amy Harland, ¶ 6, **EXHIBIT A.**) After eliminating the persons who worked in the above-referenced, non-relevant field offices, **Harland confirms that, as of March 19, 2004, Progressive employed 47 persons in the Norman and Oklahoma City field offices, combined.** (*See* Affidavit of Amy Harland, ¶ 17, **EXHIBIT A**; *see also* Employee Roster which identifies every person employed at Progressive's Norman and Oklahoma City field offices as of March 19, 2004, attached as **EXHIBIT H.**)

The FMLA only applies to "eligible employees." Plaintiff cannot prove that she is an "eligible employee" as defined by the FMLA. Progressive did not employ 50 or more employees at its Norman field office, or within 75 miles of the Norman field office on March 19, 2004. Because being an "eligible employee" is an essential element to confer subject matter jurisdiction on a federal court, Plaintiff cannot make a *prima facie* showing that this Court has subject matter jurisdiction over her claims. Since the Court does not have federal subject matter jurisdiction, Defendants' Motion for Summary Judgment must be granted. *See Womble v. Bhangu,* 864 F.2d 1212, 1213 (5th Cir. 1989) (federal courts do not have subject matter jurisdiction over claims involving employers with fewer employees than required by the statute).

This conclusion was reached in a factually similar case, *Douglas v. E.G. Baldwin & Assoc., Inc.*, 150 F.3d 604, 608 (6th Cir. 1998). In *Douglas*, it was unquestioned that the employer employed far more than 50 employees nationwide. Further, there was no serious dispute that the employer employed less than 50 employees within 75 miles of the pertinent location. Although the employer did not employ the requisite number of employees to be a FMLA covered employer, the employer voluntarily complied with the FMLA. The employee took FMLA leave and, when she returned, her position had been eliminated. She was offered a position that was not "equivalent" to the position she held prior to her FMLA leave. She brought claims against her employer under the FMLA. The Sixth Circuit Court of Appeals held that federal courts are courts of limited jurisdiction, and therefore, it could not hear the employee's FMLA claims against her employer because she was not an eligible employee under the FMLA. Thus, the federal court did not have subject matter jurisdiction and the plaintiff's claims were dismissed. *Id.* at 605.

A similar situation was presented in *Bliss v. Jennifer Convertibles, Inc.*, 2003 WL 22239655 (N.D. Ill. Sept. 29, 2003). In that case, the plaintiff worked in Chicago for a nationwide furniture store. Despite the fact that defendant maintained a written policy granting each employee a leave of absence regardless of the employee's eligibility under the FMLA, the court dismissed the plaintiff's FMLA lawsuit, concluding that the plaintiff was not an eligible employer under the act because the defendant employed fewer than 50 employees at or within a 75 mile radius of the store where plaintiff worked. The court also noted that the plaintiff's FMLA retaliation claim also failed under the same eligibility principle – "there is ample

authority . . . that one cannot bring a claim for retaliation under the Act in response to a request for FMLA leave if one is ineligible for FMLA leave." *Id.* at *17, citing *Morehardt v. Spirit Airlines, Inc.,* 174 F.Supp.2d 1272, 1281 (M.D. Fla. 2001) ("where the employee takes leave, or requests to take leave, that he is not eligible for . . . the employee cannot be deemed to have engaged in protected activity and, therefore, termination by the employer in such a circumstance cannot be grounds to support a retaliation claim under the FMLA").

Simply put, if an employer does not employ 50 or more employees on the date the employee gives notice of the need for FMLA leave, then the employee is not an "eligible employee," as defined by the FMLA. If the employee is not eligible for FMLA leave, the court lacks subject matter jurisdiction over the action. *See Wascura v. Carver,* 169 F.3d 683, 685 (11th Cir. 1999) ("where a defendant in an FMLA suit does not meet the statutory definition of 'employer,' there is no federal subject matter jurisdiction over the claim against the defendant"); *see also Hukill v. Auto Care, Inc.,* 192 F.3d 437 (4th Cir. 1999) (because the employer had fewer than 50 employees, the district court lacks subject matter jurisdiction over the employee's claims); *Humenny v. Genex Corp., Inc.,* 390 F.3d 901, 905 (6th Cir. 2004) ("if the plaintiff does not qualify as an 'eligible employee,' the plaintiff does not state a claim for relief under the FMLA"); *Coen v. Sybron Dental Specialties,* 2001 WL 45478 (6th Cir. 2001) (provisions of FMLA did not apply where employer had only 17 employees at or within 75 miles of office where employee worked); *Paleologos v. Rehab Consultants, Inc.,* 990 F. Supp. 1460, 1468 (N.D. Ga. 1998) (employer who did not employ at least 50 people at or within a 75 mile radius of employee's former

work site could not be sued under the FMLA); *Schlett v. Avco Financial Services, Inc.,* 950 F.Supp. 823, 835 (N.D. Ohio 1996) (summary judgment was proper against employee's FMLA claim where employer employed less than 50 employees within 75 miles of employee's worksite); *Muller v. The Hosty Corporation,* 917 F.Supp. 1389, 1418-1419 (N.D. Iowa 1996) (summary judgment was proper against employee's FMLA claim where employer employed less than 50 employees within 75 miles of employee's worksite regardless of whether employer admitted that it was an "employer" as defined under the FMLA).

It is undisputed that Plaintiff worked at Progressive's Norman field office on March 19, 2004. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 3.) It is also cannot be disputed that on March 19, 2004, there were fewer than 50 employees of Progressive employed within a 75 mile distance of Progressive's Norman field office. (*See* Defendants' Statement of Undisputed, Material Facts, Fact No. 4.) Therefore, Plaintiff is not an "eligible employee" as defined by the FMLA. *See* 29 U.S.C. §§ 2611(2)(B). Because Plaintiff is not an eligible employee, this Court, like the district courts in *Douglas, Bliss, Coen, Schlett and Muller,* does not have subject matter jurisdiction. Thus, Defendants' Motion for Summary Judgment must be granted.

CONCLUSION

To be eligible, an employee must be among a workforce of sufficient size in a certain geographical location to claim the benefits of the FMLA. Congress has set the lower limit at 50 employees in a 75 mile area. Because the undisputed facts demonstrate that the number of

Progressive employees within a 75 mile radius of Plaintiff's worksite was less than 50, Plaintiff is not able to prove an essential element of her claim under the FMLA, and the Court must grant Defendants' Motion for Summary Judgment.

Respectfully submitted,

/s/ Brad Roberson
Gerard F. Pignato, OBA No. 11473
Brad L. Roberson, OBA No. 18819
PIGNATO & COOPER, P.C.
1120 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 606-3333
Facsimile: (405) 606-3334
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

■ This is to certify that on the 29th day of March, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Stanley M. Ward, Esquire
Woodrow K. Glass, Esquire
Scott F. Brockman, Esquire
WARD & GLASS, L.L.P.
629 24th Avenue S.W.
Norman, Oklahoma 73069

ATTORNEYS FOR PLAINTIFF

☐ I hereby certify that on the ___ day of ___, 2005, I served the attached document by U.S. Mail on the following, who are not registered participants of the ECF System:

/s/ Brad Roberson
For the Firm

[Exhibits Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) KELLY HACKWORTH, Plaintiff,	)	
-vs-	)	
(1) PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation and (2) JERRY JOHNSON, individually, Defendants.	)	Case No. CIV-05-11-R

PLAINTIFF'S BRIEF IN RESPONSE AND OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 18, 2005)

Plaintiff Kelly Hackworth ("Hackworth") submits the following brief in response and objection to Defendants Progressive Casualty Insurance Company Jerry Johnson's ("Johnson") motion to dismiss. The overwhelming majority of circuit and district courts have found that, under the unambiguous language of the controlling statute, individual supervisors such as Johnson can be held liable under the Family Medical Leave Act ("FMLA"). Hackworth contends that this Court should follow the majority's lead, and respectfully requests that this Court deny Johnson's motion. Hackworth further states as follows:

SUMMARY OF FACTS

This is a case where an employee was retaliated against and terminated for requesting time off of work under the FMLA. Kelly Hackworth began working for

Progressive Casualty Insurance Company ("Progressive") on or about the 26th day of March, 1996, and was promoted to Injury Ops Manager II in 2000. Hackworth's supervisor, Jerry Johnson, worked at [sic] the state claims manager for Progressive, and provided direct supervision over Hackworth's work activities.

On March 19, 2004, Hackworth's mother became ill and was hospitalized with severe septic arthritis of her shoulder and was required by her medical doctor to remain hospitalized for two weeks. Hackworth contacted Progressive on March 19, 2004 and requested time off from work to care for her mother and further requested leave under the Family Medical Leave Act ("FMLA").

On the same day of Hackworth's request for FMLA, Johnson, Hackworth's direct supervisor, offered Hackworth either a demotion from her position of Injury Ops Manager II to an Injury Ops Manager I or severance package. Johnson gave Hackworth three (3) days of paid time off to consider his offer and, at the end of this three-day period, Hackworth was off from work on approved FMLA. Following her release from the hospital, Hackworth's mother required constant daily care and assistance at her home. Hackworth stayed with her mother to provide for the daily medical needs.

On April 23, 2004, Hackworth filed a charge of gender-based discrimination with the EEOC alleging violation of Title VII of the Civil Rights Act of 1964, as amended. On May 20, 2004, the parties to [sic] agreed to conduct a mediation session related to Hackworth's alleged gender-based discrimination charge. The mediation was scheduled for June 8, 2004. Although, Hackworth's FMLA expired on June 1, 2004, and she reported her willingness and ability

to return to work on May 28, 2004, Amy Harlan ("Harlan"), one of Progressive's employees, advised Hackworth not to return to work because her presence would be "uncomfortable" for everyone until after the EEOC mediation was completed on June 8, 2004. By agreement, Hackworth's FMLA leave was extended until June 22, 2004, and on that day, Hackworth advised of her intentions to reject the pending offer by Progressive presented to her at the mediation and instead advised that she would accept a return to work as an Injury Ops Manager I.

Harlan then contacted Hackworth and advised Hackworth not to return to work because the position of Injury Ops Manager I was eliminated in its entirety. Neither Harlan nor any other agent or employee of Progressive offered Hackworth any other equivalent work or compensation. Soon thereafter, on June 30, 2004, Progressive posted an internal job opportunity posting for an Injury Operations Manager I, the same position that Progressive informed Hackworth was being eliminated, and on July 11, 2004, Progressive posted an employment opportunity in *The Tulsa World* newspaper for the same Injury Operations Manager I position. The job was later filled on September 29, 2004.

Hackworth filed this suit alleging that Defendants violated FMLA by failing to reinstate Hackworth to her same or a similar position upon her return from leave, and by retaliating against Hackworth for engaging in a protected activity, namely, utilizing FMLA for time off work. Defendant Johnson has filed his motion to dismiss.

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED, MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Denied. First of all, Defendants have failed to provide this Court or Plaintiff with copies of the payroll records reviewed by Amy Harland. Therefore, for purposes of this response, Plaintiff cannot verify the number of employees and is not conceding that Defendants' employee numbers are completely accurate. Assuming such numbers are correct, there are actually fifty (50) employees within seventy-five (75) surface miles of Progressive's Norman office, since the Lawton office is also within seventy-five (75) miles of Norman. Exhibit "1", Norman to Lawton Information.[1]

5. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

6. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

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[1] Each Exhibit includes an information pack including the longitude and latitude of the two locations (which was determined at the website, www.geocode.com), distance between those longitude and latitude measurements (which was determined at the website, www.indo.com/distance/) and a map of the two locations (determined at the website www.keyhole.com).

7. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

8. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

9. Admit.

10. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

11. Admit that this is Harland's testimony. Plaintiff has no tangible evidence to completely admit or deny this alleged fact.

12. Denied. The surface distance between the Norman and Oklahoma City offices is twenty-five (25) miles. Exh. "2", Norman to Oklahoma City Information.

13. Denied. The surface distance between the Norman and Tulsa offices is 110 miles. Exh. "3", Norman to Tulsa Information.

14. Denied. The surface distance between the Norman and Enid offices is eighty-six (86) miles. Exh. "4", Norman to Enid Information.

15. Denied. The surface distance between the Norman and Lawton offices is sixty-seven (67) miles. Exh. "1", Norman to Lawton Information.

16. Denied. The surface distance between the Nôrman and Muskogee offices is 126 miles. Exh. "5", Norman to Muskogee Information.

Denied. The Lawton office is within seventy-five (75) surface miles of the Norman office. Exh. "1", Lawton to Norman Map.

ARGUMENT AND AUTHORITIES

PROPOSITION I

SUMMARY JUDGMENT IS NOT WARRANTED

Although Defendants include an argument for dismissal under Rule 12(b)(1), it appears that their motion is one for summary judgment under Rule 56. Therefore, Hackworth states that it is well known that summary judgment is appropriate only if the admissible evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Horizon/CMS*, 220 F.3d at 1190. A dispute over a material fact is "genuine" if a rational jury could find in favor of the nonmoving party on the evidence presented. *See Id.*

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097(2000) the Court stated:

> "although the court should review the record as a whole, it *must* disregard all evidence favorable to the moving party that the jury is not *required* to believe. See Wright & Miller 299. That is, the court *should* give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is *uncontradicted*

> and *unimpeached*, at least that that evidence comes from *disinterested witnesses*."

120 S.Ct. at 2110 (emphasis added).

For purposes of summary judgment, Hackworth's evidence must be believed and all justifiable inferences must be drawn in her favor. For purposes of this motion, this Court must assume that Hackworth's version of the disputed facts is correct. *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1392 n.2 (10th Cir. 1997); *see also Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. Aug 11, 2000). The evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to the party opposing summary judgment. *Reeves*, 120 S.Ct. at 2101; *Simms v. Oklahoma*, 165 F.3d 1321 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 53 (1999).

Summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact. *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995). "[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* at 453. Hackworth contends that at the very least a dispute of fact as to how many employees Progressive employed within seventy-five (75) miles of the Norman office. In fact, Hackworth asks this Court to rule as a matter of law that Progressive did employ fifty (50) employees with [sic] seventy-five (75) miles of Norman, and further to deny Defendants' motion for summary judgment.

PROPOSITION II

PLAINTIFF IS AN ELIGIBLE EMPLOYEE UNDER THE FMLA

Hackworth first states that no discovery has been had on this case, and therefore, Hackworth has not had a chance to review Progressive's payroll records to determine if the number represented in Amy Harland's affidavit is correct or incorrect. While Hackworth does not doubt the veracity of Harland's computations, this Court is well aware that accounting mistakes can occur. Furthermore, there may be some questions of fact remaining as to whether an employee was employed at a certain branch at the time in question, or about who is on the payroll records that might be on leave, et cetera. Because Hackworth has not reviewed the payroll records in question, she is not ready to concede Defendants' stated numbers, but does accept them and relies upon them for the purposes of this response.

That being said, Hackworth further states that assuming said numbers are correct, Progressive is an "employer" as that term is defined in the FMLA, and Hackworth is an "eligible employee". While Hackworth is unsure whether Defendants' stated employee numbers are correct, she is convinced that Defendants' stated distances between the different worksites in Oklahoma is incorrect. Defendants utilize a "driving distance" technique to determine the distance between Oklahoma towns, which is inaccurate and contrary to Congress' intent to determine the number of miles between two worksites.[2]

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[2] Defendants cite the case of *In re Extradition of Gonzalez*, 52 F.Supp.2d 725 (W.D. La. 1999), for the proposition that this Court can

(Continued on following page)

The statute in question states, in relevant part, " . . . if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. §2611(2)(B)(ii). The statute specifically does not state "driving miles", or "within 75 miles if driving by car". This Court must look at the plain language of a statute to interpret its ordinary common meaning. *See Connecticut Nat'l Bank v. Germain*, 117 L. Ed. 2d 391, 112 S. Ct. 1146, 1149 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says"). When words of a statute are unambiguous, judicial inquiry should end, and the law should be interpreted according to the plain meaning of its words." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993). Here, the plain meaning of the statute is direct mileage or surface mileage, and Defendants concede in their brief that this Court should look at a seventy-five (75) mile radius of Norman, not strictly driving distances. As is evident in Hackworth's Exhibit "6", Lawton is within the 75-mile radius of Norman.

Moreover, the only way to truly determine the surface distance between two sites is to determine the number of miles "as the crow flies." As this Court well knows, this well-known and well-used vernacular finds the distance between two points using a straight line. And in an attempt to be even more precise, Hackworth has found the longitude and latitude measurements for each of Progressive's

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take judicial notice of Mapquest's surface mile distance between two points, but actually the Louisiana Court uses Mapquest to determine the driving distance between two points, not the surface distance. Furthermore, in that particular case, the mileage was not seriously disputed, but it certainly is in the instant matter.

Oklahoma sites and measured the straight-line distance between each. Hence, Hackworth's attached exhibits setting forth the number of miles between the worksites is more reflective of Congress' intent than an imprecise calculation of miles by man-made road as portrayed by Defendants.

After using a precise determination of the number of miles between worksites, it is clear that the Lawton office is within 75 miles of the Norman office. In fact, the exact distance between the 2420 Springer office in Norman and the 1315 NW Sheridan office in Lawton is 67 miles, and under FED.R.EV. Rule 201(b)(2), this Court should take judicial notice of this fact because, as is shown in Exhibit "1", such surface mileage is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Therefore, after this Court takes judicial notice that Lawton is within a seventy-five (75) mile radius of Norman, there should be no dispute of fact as to whether the number of employees at the Lawton office should be considered in the calculations to determine whether Progressive is an "employer" under the FMLA. Defendants represent that there are three (3) employees at the Lawton office, and assuming that number is correct, the total number of employees at the Norman, Oklahoma City, and Lawton offices is fifty (50). And, since Progressive had fifty (50) employees within seventy-five (75) miles of Norman on March 19, 2004, jurisdiction in this Court is proper.

Hackworth is an eligible employee under the FMLA, and Progressive is required to follow the FMLA in this

instance. Progressive's Norman office may not have fifty (50) employees, but when those offices within seventy-five (75) miles of Norman are considered, Oklahoma City and Lawton, Progressive has fifty (50) employees, and therefore, jurisdiction in this Court for Hackworth's claims under the FMLA is proper. This Court should deny Defendants' summary judgment motion and rule as a matter of law that Defendants employ [sic] least fifty (50) employees within a seventy-five (75) mile radius of Norman.

CONCLUSION

Defendants incorrectly state that Lawton is not within seventy-five (75) miles of Norman. Their attached driving direction maps are inaccurate and do not adequately reflect the intent of the FMLA statute governing this case. The statute simply states "within 75 miles" which indicates within 75 surface miles or within a 75-mile radius of the employee's worksite. Because Defendants represent that there are fifty (50) employees at the Norman, Oklahoma City, and Lawton offices combined, Hackworth is an eligible employee under the FMLA and jurisdiction in this Court is proper.

IT IS FOR THE REASONS SET FORTH HEREIN that Plaintiff Kelly Hackworth respectfully requests that this Court deny Defendants Progressive Casualty and Jerry Johnson's motion for summary judgment and rule as a matter of law that Plaintiff has validly brought a cause of action against Defendants under FMLA.

DATED this 18th day of April, 2005.

Respectfully submitted,

s/ Scott F. Brockman
Stanley M. Ward, OBA #9351
Woodrow K. Glass, OBA #15690
Scott F. Brockman, OBA #19416
WARD & GLASS, L.L.P.
629 24th Avenue SW
Norman, Oklahoma 73069
Telephone: 405-360-9700
Facsimile: 405-360-7902
law@wardglasslaw.com
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that on this 18th day of April, 2005, a true and correct copy of the above and foregoing was electronically transmitted to the Clerk of the Court using ECF System for filing and transmittal of a Notice of Electronic Filing was electronically sent to the following counsel of record:

Gerard F. Pignato
Brad L. Roberson
PIGNATO & COOPER, P.C.
1120 Robinson Renaissance
119 N. Robinson
Oklahoma City, OK 73102

/s/ Scott F. Brockman
Scott F. Brockman

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KELLY HACKWORTH,

Plaintiff,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY, an Ohio corporation,

Defendant.

Case No. CV-05-1467-M

TRANSCRIPT OF PROCEEDINGS

HAD ON FEBRUARY 12-13, 2007

TESTIMONY OF KELLY HACKWORTH

BEFORE THE HONORABLE VICKI MILES-LaGRANGE, JUDGE PRESIDING

APPEARANCES

MR. STAN WARD and MR. WOODROW GLASS, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the Plaintiff.

MR. BRAD ROBERSON and MR. PAUL KOLKER, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the Defendant.

* * *

[124] you were accepting the Injury Operations Manager I position, did he?

A. No.

Q. You had told Lisa Johnson, the physician's assistant for Dr. Shadid, that you had lost your job prior to June 22, 2004, didn't you?

A. Yes.

Q. You have testified that you were terminated because you were discriminated against because you are a female and because you were retaliated against because of going to the EEOC. Are there any other reasons why you believe you were terminated?

A. No.

Q. I would like for you to turn to Defendant's Exhibit 1. What Defendant's Exhibit 1?

A. The Petition.

Q. In what case?

A. Kelly Hackworth versus Progressive Casualty Insurance.

Q. What did this case involve?

A. The Family Medical Leave Act.

MR. ROBERSON: May I have permission to demonstrate this exhibit to the jury?

THE COURT: You may.

MR. WARD: Just as a matter for the record, he has not offered this document into evidence and as a general rule you don't show documents until they are in evidence.

[125] THE COURT: True.

MR. ROBERSON: I would move at this time to move the document into evidence. She has verified the document.

MR. WARD: It is not relevant or material to this lawsuit.

MR. ROBERSON: It is based upon the question –

THE COURT: Just –

MR. WARD: It is collateral, even if relevant. (Proceedings at the bench, out of the jury's hearing:)

MR. ROBERSON: She said that there was no other reason why she was terminated other than gender discrimination and retaliation. She filed a lawsuit saying she was terminated because of the violation of it.

THE COURT: I will let you question –

MR. ROBERSON: There is no objection on the pretrial, other than what was sustained in the motion in limine that you ruled on. They made no other objection.

THE COURT: Is that right?

MR. GLASS: I would have to look at the Pretrial Order.

The objection is that the pleading is not a proper exhibit and subject to a motion in limine.

MR. ROBERSON: That is the same objection with the other Complaint. We argued this previously. This

is [126] impeachment. She said there was no other reason why she was terminated.

THE COURT: I am going to let you ask the question but not introduce the Complaint into evidence. That will be the ruling of the Court and your exception is noted.

(Proceedings resumed within the hearing of the jury:)

Q. (By Mr. Roberson) In that document is there another reason why you were terminated from your employment at Progressive that you previously stated?

A. I don't know.

Q. Turn to page 7321 of that document.

A. Okay.

Q. Paragraph 38.

A. Yes, sir.

Q. Does that refresh your memory that you believed on January 4, 2005 that you were being terminated against – or you were being terminated because you had been retaliated against because you took family medical leave?

A. It says it was a direct result and the causal connection in the protected rights to which she had under the FMLA.

Q. Do you agree that you were terminated and retaliated against while employed with Progressive because you went on FMLA?

A. I believe that may have been part of the reason, yes.

Q. You filed a lawsuit against Progressive, correct?

* * *